Professional Fees in Private Practice: the Question of Regulation

Report of the Office des Professions du Québec

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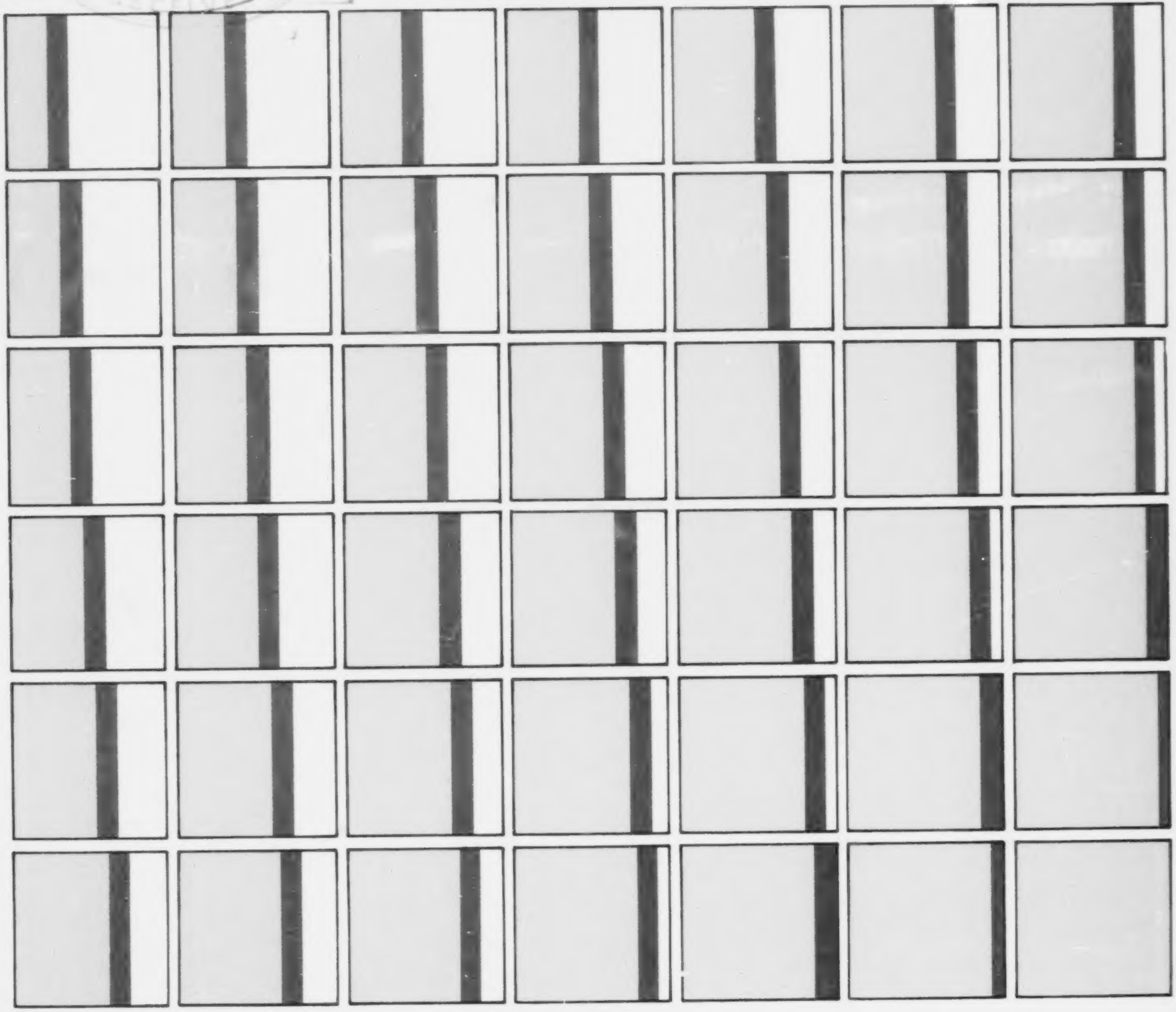

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PROFESSIONAL FEES IN PRIVATE PRACTICE: THE QUESTION OF REGULATION

REPORT OF THE OFFICE DES PROFESSIONS DU QUEBEC

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FOREWORD

As chairman of the *Office des Professions du Québec*, it is my pleasure to submit the English version of the *Office* report entitled "La réglementation des honoraires professionnels dans la pratique privée".

The report was submitted to the Minister responsible for the application of legislation governing the professions in June 1977. Since that time, the former Chairman of the Office, Mr. René Dussault, has taken on the duties of deputy minister in the Québec *Ministère de la Justice*. Two other members of the *Office*, Miss Edith Aston (physiotherapist) and Mr. Paul-Émile Patry (physician) terminated their term of office and were succeeded by Miss Danièle Bédard (psychologist) and Miss Colette Tracyk (occupational therapist).

It is the sincere wish of all the members of the *Office*, both past and present, that the English version of the report will prove to be a useful contribution to the discussions being held outside Québec on this question of current interest.

ANDRÉ DESGAGNÉ
Chairman

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OFFICE DES PROFESSIONS DU QUEBEC

Mr. Jacques-Yvan Morin
Minister responsible for the application
of legislation governing the professions
Government of Québec

Sir:

We have the honour to submit our report on the regulation of professional fees in private practice, prepared by virtue of the power given us under section 12 (u) of the Professional Code.

Yours truly,

René Dussault
Chairman

Vice-chairman

Guy [illegible]

Paul-Emile Patry

Québec, June 1977

THE MEMBERS OF THE OFFICE DES PROFESSIONS*

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THE FOLLOWING EMPLOYEES OF THE OFFICE WERE MORE PARTICULARLY INVOLVED IN THE PREPARATION OF THE REPORT:

Mr. Louis BORGEAT, coordinator

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* see Foreword

INTRODUCTION

Before the adoption of the Professional Code[1], many professional corporations in Québec were empowered to impose or suggest, by by-law, a tariff of fees, or fee schedule, for the professional services rendered by their members. This situation changed in 1973 when the Québec Legislature gave the *Office des professions du Québec*, an agency created "to see that each corporation ensures the protection of the public"[2], the power to set tariffs, until that time the prerogative of the professional corporations.

Section 12(u) of the Code states that the *Office* must

> suggest for approval to the Lieutenant-Governor in Council, after consultation with the corporation and bodies concerned, a tariff of professional fees for the services rendered by the members of the corporation, when the cost of these services is not fixed by collective agreement or determined by law.

By virtue of the powers given them under this section, the *Office* and the government may amend or replace the tariffs now in force in the professional corporations.

This report to the Lieutenant-Governor in Council contains the reflections and recommendations of the *Office* on all aspects of the regulation of professional fees. The introductory chapter looks into the power to establish fee schedules for professionals given the *Office* under the terms of section 12(u) of the Professional Code; in the three subsequent chapters the various ways in which fees may be regulated are analysed and appropriate recommendations made.

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[1] S.Q. 1973, c. 43.

[2] Idem, sec. 12, first paragraph.

INTRODUCTORY CHAPTER: THE POWER TO ESTABLISH FEE SCHEDULES FOR PROFESSIONALS

This chapter describes the context within which the *Office* was given the power to set tariffs of professional fees; it also studies the question of such fee schedules in relation to consumer protection.

I. EMPOWERING THE OFFICE TO ESTABLISH FEE SCHEDULES FOR PROFESSIONALS

Before examining the extent of the *Office*'s power to set tariffs, it is incumbent upon us to study the power that the professional corporations held until recently in this respect and the manner in which that power was exercised.

A. The power to set tariffs prior to the adoption of the Professional Code

Before the adoption of the Professional Code, 15 of the 29 existing professional corporations[3] were empowered under the acts constitutin them to impose or suggest, by by-law, fee schedules for services rendered by their members.[4] As shown in Table 1, nine of the

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[3] This report does not deal with the small number of professional corporations which were created by individual acts before the adoption of the Professional Code and which are still not subject to the Code, namely the corporations of professional librarians, jewellers, interior decorators, electronicians, chartered municipal officers and professional technicians. Two of these groups, the corporation of jewellers and the corporation of electronicians, have the specific regulatory power to determine a tariff of fees.

TABLE 1

PROFESSIONAL CORPORATIONS WHICH HAD THE POWER TO ESTABLISH FEE SCHEDULES BEFORE THE PROFESSIONAL CODE WAS ADOPTED

Professional corporations which adopted fee schedules

1 Agronomists
2 Architects
3 Land surveyors
4 Advocates
5 Chartered appraisers
6 Engineers
7 Forest engineers
8 Notaries
9 Urbanists

Professional corporations which did not adopt fee schedules

1 Vocational guidance counsellors
2 Physicians
3 Optometrists
4 Speech therapists and audiologists
5 Pharmacists
6 Psychologists

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[4] See appendix 1: "Legislation prior to the Professional Code giving certain professional corporations the power to establish fee schedules".

15 corporations adopted a schedule under a by-law approved by the Lieutenant-Governor in Council.[5] These schedules are still in effect[6] and will remain so until such time as they are modified or replaced under the terms of the Professional Code.

The fee schedules vary from corporation to corporation in the extent to which they cover the range of available professional services. They set the minimum rates for some or all of the services in question. For eight of the nine professional corporations which adopted fee schedules, the rates are obligatory in virtue not only of the actual text of the by-law[7] but also of a specific regulatory provision which obliges the professionals to respect the terms of the tariff; to do otherwise would be to violate their code of ethics.[8]

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[5] Under the acts constituting the 15 corporations, a tariff of fees must be approved by the Lieutenant-Governor in Council before coming into effect. In this respect, it is worth pointing out that one of the professional corporations listed in Table 1 as not having adopted a fee schedule, namely the corporation of psychologists, did in fact have a schedule published in the Québec Official Gazette, August 5, 1967, page 4864, but it was never approved by the Lieutenant-Governor in Council.

[6] In virtue of section 262 of the Professional Code and a similar transitional provision in the acts constituting the exclusive professional corporations, the by-laws which already existed when the Professional Code was adopted will remain in force until such time as they are amended, replaced or repealed under the Code. It is for this reason that the tariffs of professional fees adopted prior to the Professional Code are still in effect.

[7] See Appendix 2, "Fee schedules now in force". Note that of the nine fee schedules, only that of the architects is not obligatory; we will come back to this matter in footnote 43.

In addition to these nine regulatory tariffs, there are certain tariff guides established by professional corporations[9] and professional associations[10]. These guides which, in principle, are not binding since they have not been adopted under a specific legislative provision, suggest fees, often minimum fees, for the services rendered by the members of the corporations or professional associations in question.

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[8] See Appendix 3, "Regulatory provisions prior to the Professional Code, in virtue of which failure to respect the fee schedules in force constitutes a violation of the code of ethics", and Appendix 4, "Disciplinary decisions against certain professionals who failed to respect a minimum fee schedule, rendered after the Professional Code came into force". Some of the provisions mentioned in Appendix 3 are no longer in force because they were not included in the codes of ethics that have been adopted since the Professional Code came into effect, namely those provisions concerning agronomists and engineers.

[9] Vocational guidance counsellors, industrial relations counsellors, dieticians and physiotherapists, for instance, have such guides for their fees. Moreover, in 1952 and 1959, before it had the specific regulatory power over fees granted it in 1962, the College of Physicians and Surgeons of Québec proposed minimum fee schedules to its members. In the same way in 1969, without any specific regulatory power concerning tariffs, the College of Dental Surgeons of Québec proposed to its members a tariff of fees for dental services, published in the Statutory Regulations, Québec Official Publisher, 1972, pp. 9-215 ff.

[10] Fee guides have been established in particular by the professional associations of chiropractors, dentists, dental specialists and podiatrists. Various employment agencies which are not professional associations in the strict sense of the word have also established tariffs for the private nurses and nursing assistants for whom they find positions.

In 1970, the Commission of Inquiry on Health and Social Welfare looked into the power of professional corporations to establish regulatory fee schedules. In its report entitled The Professions and Society, the Castonguay-Nepveu Commission stressed that the corporations to which the State delegated the power to ensure public protection should not endeavour to protect the interests of their members at the same time.[11] It stated that the professional corporations should not be given a decisive role in determining fee schedules for their members.[12]

Consequently, when the Professional Code was adopted in July 1973, recognizing 38 professional corporations, including nine new ones, the power to propose a regulatory fee schedule to the government was transferred from the professional corporations to the *Office des professions du Québec.*[13]

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[11] Report of the Commission of Inquiry on Health and Social Welfare, Part Five, Vol. VII, Tome 1, Québec Official Publisher, 1970, p. 18, no. 15, p. 32, nos. 61-62.

[12] Idem, pp. 56-57, nos. 157-158, p. 64, recommendations 7.1.28 and 7.1.29.

[13] Two professional corporations, the Bar and the Order of Notaries, have nevertheless retained a certain power respecting fee schedules. We will come back to this subject on pages 21-23.

B. The power to set tariffs subsequent to the adoption of the Professional Code

To fully comprehend the extent of the power to set tariffs mentioned in section 12(u) of the Professional Code, we must determine whether the *Office* is obliged to exercise this power, identify the types of tariffs which may be adopted and specify the professional services involved.

1. The mandatory nature of the power given the *Office*

Under the terms of section 12(u), the power given the *Office* is mandatory: the *Office* "must" suggest fee schedules. The *Office* is of the opinion that this obligation to suggest fee schedules to the government indiscriminately for all the professions is too absolute.

The *Office* feels it should not be obliged to suggest tariffs of professional fees for approval by the government before having had the opportunity to study the question with an eye to the protection of the consumer. The *Office* therefore intends to recommend, no matter what conclusions are reached on this matter, that the government submit an amendment to section 12(u) to the National Assembly, making the exercise of the power to set tariffs optional.

2. Types of tariffs which the *Office* has the power to adopt

There are four main types of tariffs which the *Office* can propose: minimum tariffs, maximum tariffs, fixed tariffs and tariff ranges.[14]

A minimum tariff sets the lowest fee a professional can ask for a given service. A professional may charge the exact amount or more but he may not charge less.

A maximum tariff, on the other hand, sets the highest fee a professional may ask for a given service. A professional may charge the exact amount or less but he may not charge more.

A fixed tariff sets a single rate for a given service. A professional may not charge more or less than this amount.

A tariff range sets two rates, the minimum and the maximum a professional can ask for a given service. A professional may charge anything between these two limits.

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[14] This terminology is consistent with that used by the *Centre de recherche en développement économique* of the Université de Montréal in its study entitled La tarification professionnelle dans le contexte de la pratique privée (Professional tariffs in private practice), Montreal, Université de Montréal, December 1974, and by most of the agencies that submitted a brief on professional tariffs to the *Office*. However, other terms to describe the various types of schedules may be equally acceptable.

Each of these four types of tariffs may either be compulsory or simply serve as an indication. There are therefore eight different kinds of tariffs as shown in Table 2.

TABLE 2

	Compulsory tariff	Recommended tariff
Minimum tariff	Compulsory minimum tariff	Recommended minimum tariff
Maximum tariff	Compulsory maximum tariff	Recommended maximum tariff
Fixed tariff	Compulsory fixed tariff	Recommended fixed tariff
Tariff range	Compulsory tariff range	Recommended tariff range

The import of the tariff depends largely on whether it is compulsory or simply a suggestion. A compulsory tariff, whether it is a minimum, maximum or fixed tariff, or a tariff range, is intended to control the fee set for a given professional service. A recommended tariff, on the other hand, is only a guide which the professional is free to follow or not when he sets the fee for a professional service.

It should be emphasized that all tariffs include a unit by which fees are calculated; this unit may be the time taken to perform the service, the act itself, or the percentage of the costs or other amounts related to the service. This is the unit referred to in expressions such as hourly rate, daily rate, fee by the act or percentage fee.

It is not the purpose of the *Office* in this report to study the pros and cons of these units which simply represent the methods of applying tariffs. If the *Office* and the government agree to set such tariffs, the choice of unit on which to base calculations should be discussed with the professional corporations and other agencies concerned. For the time being, the *Office* is interested mainly in examining the import of the various tariffs mentioned in Table 2.

3. The professional services affected by the power given the *Office*

Under section 12(u), the *Office*'s power to set fee schedules affects all professional services, except those whose rates are "fixed by collective agreement or determined by law". In order to understand exactly which services are affected by this power, the extent of each of these two exceptions must be studied.

(a) First exception: professional services the fees for which are fixed by collective agreement

If we give the expression "collective agreement" used in section 12(u) the meaning it has in the Labour Code[15] - and that seems to be the most likely interpretation - the first exception to section 12(u) has the effect of excluding only a portion of the salaried professionals. Many salaried professionals do not have a collective agreement but rather a personal or collective contract which was not negotiated under the terms of the Labour Code.

This interpretation, which gives the *Office* very broad powers, makes a distinction between salaried professionals whose terms of remuneration have been established in keeping with the procedure set out in the Labour Code and the other professionals, whether salaried or not. Therefore, although the *Office* cannot interfere when there are collective agreements, because of the control provided by the various stages of negotiation set forth in the Labour Code, it should intervene in all other cases since there is no institutional framework to ensure a degree of control over the fees set.

The *Office* cannot readily accept such an interpretation which implies that the *Office* and the government could use tariffs of fees to impose salary conditions which would have to be respected in the negotiation of personal or collective contracts, other than collective agreements, involving employees who are members of professional corporations. For instance, an insurance company that wanted to hire a chartered appraiser on a salary basis would have to respect the tariff adopted under section 12(u); the same would hold true for a private or public enterprise that wanted to negotiate the working conditions of a group of engineers in its employ, without a collective agreement.

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[15] R.S.Q. 1964, c. 141, s. 1 (e), amended by S.Q. 1969, c. 47, s. 2.

The *Office* does not believe the legislator meant to give it or the government such broad and extensive powers in terms as general as those of section 12(u) of the Professional Code. If the legislator had intended to give the government the power to intervene in the labour relations of professionals who do not have a collective agreement, it would certainly have said so in unequivocal terms. In fact, when, in the past, the legislator has desired to give a regulatory authority such as the Lieutenant-governor in Council the power to make certain working conditions applicable to a group of salaried employees, it has adopted a specific act for this purpose, clearly establishing the process by which such power would be exercised.[16]

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[16] See, for instance, the Collective Agreement Decrees Act, R.S.Q. 1964, c. 143 and the Minimum Wage Act, R.S.Q. 1964, c. 144.

In addition, the *Office* believes that this interpretation could lead to contradictory situations. Engineers employed by the Government of Québec, and therefore bound by a collective agreement within the meaning of the Labour Code, for instance, would not be subject to a tariff adopted under section 12(u), while the lawyers and notaries employed by the same government would, simply because they have a bona fide union which is not a certified association within the meaning of the Labour Code and which for that reason cannot conclude a collective agreement within the meaning of the Code. Such an interpretation could obviously lead to entirely artificial distinctions.

Given these conditions, the *Office* cannot agree to go by the present wording of the first exception. After analysing the situation, it is of the opinion that its power to set tariffs should be applied essentially to those professionals who have traditionally been given fee schedules. These are the professionals in private practice, not only those who are self-employed but also the salaried professionals they employ, who offer their services to the public on a fee basis just as though they were self-employed. The *Office* therefore intends to recommend that the government amend section 12(u) of the Professional Code in this respect.

There are many professionals who are not affected by the *Office*'s power to determine tariffs, namely, all those who are not in private practice. In fact, as shown in Table 3, over 85% of the members of 19 of the 38 professional corporations are not engaged full time in private practice; over 50% in two other corporations[1] and over one third of the members in various others[18] are in the same position.

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[17] Industrial relations counsellors and chartered appraisers.

[18] Lawyers, chartered accountants, land surveyors, veterinary surgeons and town planners.

TABLE 3

NUMBER AND PROPORTION OF PROFESSIONALS IN PRIVATE PRACTICE FULL TIME[19]

Corporation	Total members (date)	Members in private practice		% not in private practice
		Number	%	
Chartered administrators	1168 (March 1976)	135	12	88
Agronomists	1500 (Dec. 1975)	15	1	99
Architects	1046 (March 1975)	878	84	16
Land surveyors	560 (Dec. 1975)	300	54	46
Hearing-aid acousticians	101 (Dec. 1975)	101	100	0
Lawyers	5700 (March 1976)	3000	53	47
Chemists	700 (August 1974)	70	10	90
Chiropractors	435 (March 1975)	435	100	0
Chartered accountants	6920 (March 1975)	3663	53	47
Industrial administration accountants	1299 (March 1975)	3	0.2	99.8
Licensed general accountants	1762 (March 1976)	220	13	87
Guidance counsellors	1031 (March 1975)	10	1	99
Industrial relations counsellors	350 (Dec. 1975)	70	20	80
Dentists	2013 (March 1976)	1611	80	20

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[19] The information in this table is an approximate evaluation of private practice in Québec. See Appendix 5, "Additional information on Table 3, 'Number and proportion of professionals in private practice full time'" for a list of the sources on which the table is based and information concerning various corporations, specifically the number of members working in private practice part time.

Corporation	Total members (date)	Members in private practice		% not i private practic
		Number	%	
Denturologists	416 (March 1976)	341	82	18
Dieticians	723 (March 1975)	26	4	96
Occupational therapists	325 (March 1975)	2	0.6	99.4
Chartered appraisers	846 (Jan. 1976)	375	44	56
Dental hygienists	111 (March 1976)	0	0	100
Nurses	40996 (1975)	462	1	99
Nursing assistants	15093 (March 1975)	96	0.6	99.4
Engineers	18331 (March 1975)	2700	15	85
Forest engineers	891 (March 1976)	92	10	90
Physicians	10800 (Dec. 1975)	7884	73	27
Veterinary surgeons	680 (March 1975)	310	46	54
Notaries	1731 (March 1976)	1531	88	12
Dispensing opticians	308 (Dec. 1975)	293	95	5
Optometrists	630 (Feb. 1976)	600	97	3
Speech therapists and audiologists	193 (March 1975)	1	0.5	99.5
Pharmacists	2572 (March 1975)	1749	68	32
Physiotherapists	1016 (March 1975)	105	6	94
Podiatrists	144 (March 1975)	142	99	1
Psychologists	1234 (1974)	152	12	88
Dental technicians	185 (Oct. 1976)	175	95	5
Radiology technicians	2311 (March 1975)	0	0	100
Medical technologists	1480 (March 1975)	59	4	96
Social workers	1543 (March 1975)	0	0	100
Town planners	145 (1974)	93	64	36
TOTAL	127 289	27 699	22	78

(b) Second exception: professional services the fees for which are determined by law

Section 12(u) of the Professional Code states that the *Office* is not required to suggest a tariff of fees for professional services the rates for which are "determined by law". To avoid any ambiguity, the *Office* wishes to point out that, under the terms of this exception, it has the power to determine the tariff of any professional service the fee for which is not set by legislative provision, whether the fee may be determined by such provision or not.

Take, for example, the Real Estate Assessment Act[20], which authorizes the Lieutenant-Governor in Council to adopt a fee schedule for chartered appraisers in private practice whose services are required for the application of the act; as long as this power, which affects an important sector of the field of activity of chartered appraisers, has not been exercised, the *Office* may, under section 12(u), suggest a fee schedule for the appraisers, applicable to the services covered by the Real Estate Assessment Act. Once the power given the Lieutenant-Governor in Council has been exercised, however, the tariff adopted under section 12(u) is no longer applicable to cases covered by the act.

In practice, the second exception applies mainly to those professional services rendered by private practitioners and paid for by the

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[20] S.Q. 1971, c. 50, s. 96.

State under social assistance and social insurance legislation, and those whose cost is determined by specific laws, the most important of which are the Financial Administration Act[21], the Bar Act[22] and the Notarial Act[23].

(i) Acts creating social assistance or social insurance plans

Under the health insurance plan, the legal aid plan and the contributory animal health insurance plan, the government defrays the costs of some services rendered by certain categories of professionals in private practice. In virtue of the Health Insurance Act,[24] for instance, the cost of many services rendered by physicians, optometrists, dentists and pharmacists is covered by the State. The same is true for certain services offered by lawyers and notaries, in virtue of the Legal Aid Act.[25] The State also defrays part of the cost of certain services offered by veterinary surgeons under a program created by order in council under the Agriculture Department Act.[26]

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[21] *S.Q.* 1970, c. 17.

[22] *S.Q.* 1966/67, c. 77, amended by *S.Q.* 1968, c. 69, *S.Q.* 1969, c. 48, *S.Q.* 1972, c. 14, *S.Q.* 1973, cc. 44 and 64, *S.Q.* 1974, c. 65 and *S.Q.* 1975, cc. 80 and 81.

[23] *S.Q.* 1968, c. 70, amended by *S.Q.* 1972, c. 14, *S.Q.* 1973, cc. 45 and 64, *S.Q.* 1974, c. 65 and *S.Q.* 1975, c. 81. Of the other acts constituting professional corporations with exclusive rights, the Land Surveyors Act, *S.Q.* 1973, c. 61, is the only one to mention explicitly the existence of a tariff of professional fees, in sections 62 and 67. These provisions do not grant a specific power to determine tariffs, however, since they simply refer to the tariff to be adopted in accordance with the Professional Code.

[24] *S.Q.* 1970, c. 37, s. 3, amended by *S.Q.* 1970, c. 38, s. 2, *S.Q.* 1971, c. 47, s. 2, *S.Q.* 1973, c. 30, s. 2, *S.Q.* 1974, c. 40, s. 2 and *S.Q.* 1975, c. 60, s. 1.

[25] *S.Q.* 1972, c. 14.

In accordance with the laws creating these plans, the fees payable to the participating professionals are determined by a tariff negotiated between the minister responsible for the application of the law in question and the agencies representing the professionals concerned; most of these negotiated tariffs must then be approved by the Lieutenant-Governor in Council.[27] The cost of the professional services covered by these plans is therefore regarded as "determined by law" within the meaning of section 12(u) of the Professional Code.

This exception to the *Office*'s power to determine tariffs is important, since, even if most physicians, dentists, optometrists pharmacists, lawyers, notaries and veterinary surgeons are in private practice, as is shown in Table 3,[28] the impact on these professionals of the power to determine tariffs given the *Office* is in fact limited by the number of services and contributors covered by the social plans in which the professionals take part. The power the *Office* has with respect to the professions affected by these plans is therefore limited to those services whose costs are not defrayed by the State and those services rendered by professionals who do not participate in the plans or who opt out.

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[26] R.S.Q. 1964, c. 101, ss. 28 to 33, replaced by S.Q. 1969, c. 16, s. 12 and S.Q. 1973, c. 22, ss. 17 to 19. The contributory animal health insurance program was created by Order in Council No. 2081, June 9, 1971, replaced by Order in Council No. 942-74, March 13, 1974, amended by Orders in Council No. 3815-76, November 3, 1976, No. 330-77, February 2, 1977, Nos. 1104-77 and 1105-77, March 30, 1977.

[27] See section 15 of the Health Insurance Act, amended by S.Q. 1973, c. 30, s. 6 and S.Q.1974, c. 40, s. 8; section 81 of the Legal Aid Act and section 30 of the Agriculture Department Act replaced by S.Q. 1969, c. 16, s. 12 and amended by S.Q. 1973, c. 22, s. 18. The tariff negotiated under the contributory animal health insurance plan does not have to be approved by the Lieutenant-Governor in Council.

(ii) The Financial Administration Act

In virtue of the Financial Administration Act, the Treasury Board and the Lieutenant-Governor in Council can set standards for fees under government contracts requiring the purchase of professional services.[29] The fee schedules adopted by the Treasury Board and the Lieutenant-Governor in Council under this Act for the remuneratio of lawyers, notaries, architects and engineers in private practice[30] who work on a contract basis for government departments or agencies are not subject to the *Office*'s power to determine tariffs.

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[28] See pages 15-16.

[29] *Supra*, note 21, sections 22 and 49.

[30] The standards in force for lawyers and notaries were adopted by the Treasury Board, C.T. 86970, December 17, 1974. The standards for architects and engineers were adopted by Order in Council No. 1273, April 25, 1968, *Québec Official Gazette*, June 2, 1968, p. 3393, amended by Order in Council No. 1866-74, *Québec Official Gazette*, Part 2, June 12, 1974, p. 2901.

Even though these tariffs have as yet been applied only to those services rendered by the members of four professional corporations, the power to set them is nevertheless important since it could eventually be extended to the members of other professions of which the government is an important client.

(iii) The Bar Act and the Notarial Act

Under section 126 of the Bar Act[31], the General Council of the Bar may "establish, change and replace tariffs of extrajudicial fees"[32] for the professional services of lawyers. These tariffs are determined by a by-law which, like all other by-laws of the General Council, must be approved by the Lieutenant-Governor in Council.

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[31] Supra, note 22.

[32] Extrajudicial fees are those which a client must pay his own lawyer for services rendered. They must be distinguished from judicial fees, which are those a party to a suit, usually the losing party, must pay the lawyer of the winning party, unless the court decides otherwise. In this respect, it should be mentioned that under section 125 of the Bar Act, the General Council has the power to establish judicial fees. This power is based on a principle peculiar to the administration of justice, according to which the losing party in a lawsuit must defray part of the costs incurred by the opposing party. It therefore comes under the authority of the Department of Justice and the representatives of the judicial power. Given the special nature of these fees, the *Office* does not think it advisable to discuss them at any length in this report.

In the past, the Bar has used its power to establish schedules of extrajudicial fees payable to lawyers for the collection of accounts, damage suits, expropriations, and so on.[33] Does this mean that the *Office* could use its fee-setting powers to determine the fees for services whose cost is not established by the Bar? The *Office* does not believe so. Section 126 (3) of the Bar Act states:

> In the absence of such tariffs, or of an express agreement between the advocate and his client, an advocate shall be entitled to his extrajudicial costs on a basis of quantum meruit.

If follows that the **fee** for a lawyer's services, when not determined by the Bar's tariff, must be set either by agreement between the two parties or on the basis of quantum meruit, that is, on the basis of the value the lawyer places on his services.[34] Section 126 of the Bar Act thus excludes the professional services of lawyers from the terms of section 12(u) of the Professional Code.[35]

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[33] See sections 78 to 90 of the Regulation of the Bar of Québec reproduced in Appendix 2.

[34] When an agreement cannot be reached, however, the value is set by a third party, usually a civil court or an arbitration council set up by the Bar.

[35] Although the *Office* is not empowered to suggest a tariff for the services of lawyers to the government, the second paragraph of section 12 of the Professional Code gives it the power to "make recommendations concerning the regulations and by-laws of professional corporations", thereby informing the government of its opinion of any by-law the General Council of the Bar drafts concerning the adoption, amendment or repeal of the lawyers' tariff. This power is particularly important since the Bar's present by-law governing the tariff of extrajudicial fees is only transitional, in keeping with section 81 of the Act to amend the Bar Act. S.Q. 1973, c. 44. In order to renew the tariff now in force, the Bar must present a new by-law concerning which the *Office* may make recommendations to the government.

At first glance it would appear that the Order of Notaries also has the power to establish fee schedules for its members. Section 102 of the Notarial Act[36] states that:

> The Bureau may, by resolution, suggest tariffs of professional fees for approval by the Lieutenant-Governor in Council.

This provision, however, seems inconsistent with other sections of the Notarial Act which clearly acknowledge the power section 12(u) of the Professional Code gives the *Office* where the tariff for professional services rendered by notaries is concerned.[37]

In any case, here, as with the Bar's extrajudicial fees, the *Office* sees no justification for maintaining special powers to establish tariffs. Rather, the *Office* is of the opinion that the Bar and the Order of Notaries are in the same situation as the other professional corporations whose powers to establish tariffs were transferred to the *Office* when the Professional Code was adopted.

The *Office* therefore plans to recommend that the government remedy this situation by repealing the Bar's power to suggest tariffs of extrajudicial fees and the Order of Notaries' power to propose fee schedules for its members.

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[36] Supra, note 23.

[37] Section 1(o) of the Notarial Act, for instance, defines "tariff" for the purposes of the Act as "the tariff of professional fees of notaries, made in accordance with the Professional Code". Section 7 states that a notary is entitled to a fee "determined by the tariff made in accordance with the Professional Code" for the deeds he executes and the services he renders.

It may therefore be concluded that the legislative amendments respecting the application of section 12(u) whose adoption the *Office* plans to recommend are intended not only to render the exercise of the power to determine tariffs optional but also to specify the extent of that power by limiting it in certain areas and extending it in others. The purpose of the amendments is to enable the *Office* to use its power on behalf of each profession, when necessary, but only for those professional services rendered in private practice, and then with the obvious exception of those services whose cost is determined by law.

It should be emphasized that, even in those professional corporations which have a large proportion of members working as salaried employees with a collective agreement, for instance, and therefore not subject to tariffs set by the *Office*, the *Office* may have to use its power to determine tariffs to regulate fees in private practice. The *Office*'s power to establish fee schedules is therefore likely to affect each and every professional corporation.

II. ESTABLISHING FEE SCHEDULES FOR PROFESSIONALS AND PROTECTING THE PUBLIC

Before looking at the various measures which might be taken to regulate professional fees, it would be in order to review briefly the preparatory work which went into the writing of this report.

A. Preparatory work for the report by the *Office des Professions*

Shortly after its creation, the *Office* was requested to look into the matter of professional fees. Several of the nine corporations that had established a fee schedule under legislation adopted before the Professional Code urged the *Office* to suggest that the government raise the minimum rates fixed by these tariffs; in their opinion, these rates were more or less outdated as a result of the high level of inflation over the past few years. Other corporations asked that their members be given fee schedules, usually minimum fee schedules.

Given these requests for an increase in the minimum fees which had been established in certain sectors and for the creation of similar tariffs in other professional sectors, the *Office* decided to determine whether the restriction in competition that necessarily results from the creation of a tariff could in any way serve the public interest. In the same spirit, the *Office* decided against recommending that the government approve any provision which made failure to respect a tariff of fees a violation of the professional code of ethics until such time as the question of tariffs had been fully studied.

The *Office* began its study of tariffs in the summer of 1974 by entrusting the *Centre de recherche en développement économique* of the Université de Montréal with the preliminary research which consisted mainly in determining the effects of fee setting on fees and on the quality and availability of professional services rendered by private practitioners. The study,[38] which was submitted in early 1975 and made public in June, although extremely useful from a technical point of view, did not include specific recommendations to guide the *Office* in preparing a policy.

The *Office* therefore decided to complete its study by means of public hearings which it announced in public notices in the Québec newspapers on June 19 and 20, 1975. The hearings took place in Montreal and Québec City in February and March 1976 and gave rise to the first public discussions ever held on fee schedules for professionals in private practice, with the obvious exception of the discussions which took place while such social insurance measures as the health insurance and legal aid plans were being set up.

During the hearings, the *Office* received the opinions of 32 agencies which had previously submitted briefs. These included 24 professional corporations, 6 professional associations and 2 other agencies not connected with the professional world.[39]

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[38] See *La tarification professionnelle dans le contexte de la pratique privée*, *supra*, note 14.

It is therefore in the light of the study made by the *Centre de recherche en développement économique* of the Université de Montréal, the briefs received and its own research that the *Office* studied the various measures it could take in the interests of the public, given its power to regulate professional fees.

B. The various possible formulas for setting fee schedules

In the interests of the public, the members of professional corporations in Québec are subject to public regulations which emanate from the professional corporations, the *Office des professions* and the government. These regulations, which have become particularly extensive since the adoption of the Professional Code, deal with most aspects of professional activity including admission to the professions, the integrity and competence of practitioners, standards of conduct, professional ethics, publicity and office management. In addition, they establish fee schedules for private practitioners in various professional corporations.

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[39] See Appendix 6, "Agencies heard during the public hearings on fee schedules".

The scope of these regulations places professionals among the most strictly controlled members of Québec's work force. As a result of the particular system of control thus created, certain rules of free enterprise — free access to the market, competition and free circulation of information on fees — which were extended to include services, through amendments to the Combines Investigation Act [40], on July 1, 1976, cannot be applied to the professional services sector since the regulations in question have legal precedence over the anti-combines legislation [41].

Although the purpose of these regulations, taken as a whole, is to protect the public, the *Office* noted that they also place professionals, as suppliers of services, in a position which is scarcely competitive but which is economically advantageous. Exclusive rights to practice and reserved titles, for instance, give obvious economic advantages to the members of a profession. The pressures exerted by a number of groups on the labour market in an effort to obtain one or the other of these monopolies is eloquent proof of this fact.[42]

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[40] R.S.C. 1970, c. C-23. The application of this Act was extended to include all the services in virtue of Bill C-2 entitled An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code, S.C. 1974-1975-1976, c. 76, Bill C-2 was the first of two phases to revise the competition policy in Canada, begun about 10 years ago. The second phase was introduced by Bill C-42 tabled in the House of Commons on March 16, 1977, and entitled An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof, (1st reading) 2nd Session, 30 th Parliament (Can.).

[41] See "La tarification professionnelle dans un contexte de concurrence" (Professional tariffs and the competition), André Tremblay, Revue juridique Thémis, 1977, vol. 12, no. 2.

The *Office* is well aware of the fact that regulations to establish fee schedules exaggerate this situation by almost completely removing professionals from the need to engage in price competition. Therefore, before recommending that the government adopt fee schedules for professional services rendered in private practice, the *Office* believes it necessary to analyse at length the objectives and effects of a step which will have such important repercussions for the suppliers and the consumers of professional services.

Such an analysis is liable to vary with each person's conception of the public interest as regards professional services. The *Office*, for one, believes that public protection in this area involves, basically, two points: first, the quality of the professional services offered and, second, the effective distribution of services and their availability and financial accessibility. This last aspect is directly linked to rates for professional services and is particularly affected by a regulatory power such as the power to establish tariffs of professional fees.

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[42] Between April 1974 and March 1977, 24 groups of workers in different sectors of the economy officially requested that they be constituted as a professional corporation by the *Office*. During the same period, almost 40 other groups requested information on the subject from the *Office* and some clearly stated their intention of making an official application for incorporation in the near future. The creation of new professional corporations was the subject of a recent report by the *Office*, entitled, The Evolution of Professionalism in Québec, Québec, September 1976.

The *Office* therefore intends to analyse and evaluate the three possible formulas for dealing with fee schedules which were discussed during the public hearings on the subject from the standpoint both of the quality of professional services and the availability and financial accessibility of those services.

The three suggested formulas are:

1. maintaining the system of compulsory minimum tariffs and extending it to other professions;

2. introducing tariffs other than compulsory minimum tariffs;

3. abolishing fee schedules and introducing measures to promote competitive fees for professional services.

CHAPTER ONE: MAINTAINING THE SYSTEM OF COMPULSORY MINIMUM TARIFFS AND EXTENDING IT TO OTHER PROFESSIONS

When exercising their power to establish fee schedules, the professional corporations have traditionally adopted compulsory minimum rates. In fact, eight of the nine tariffs in force prior to the Professional Code imposed minimum fees.[43] Several professional corporations have had such a tariff for many years and the rates have been adjusted more than once. The Order of Land Surveyors, for instance, has had a tariff since 1882, amended by the Lieutenant-Governor in Council in 1889, 1904, 1921, 1949, 1961, 1966 and 1972.[44]

One of the first preoccupations of the members of certain new professional corporations has been the adoption of a fee schedule. The brief presented by the Order of Engineers, for instance, states that one of the first resolutions of the Council of the Corporation of Engineers of Québec in 1920, the year it was created, sought the adoption of a fee schedule;[45] the Association of Architects of the Province of Québec, created through legislation on December 30, 1890, prepared a draft fee schedule as early as June 8, 1891, and submitted it for the approval of the government the following year.[46]

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[43] As was mentioned in note 7, the architects' tariff is the only real exception. It suggests minimum fees for certain services but these are official rather than compulsory, that is, as stated in the former Architects Act, R.S.Q. 1964, c. 261, s. 10, they "shall be accepted in all courts of law as evidence of the value of such services, unless there be an agreement in writing to the contrary". This subject will be discussed again on page 138. It is also worth mentioning that five of the eight minimum fee schedules stipulate that there must be an agreement between the client and the professional before the latter can ask a fee higher than that given in the schedule. See Appendix 2, Regulation of the Bar of Québec, s. 86(2); the Engineer's tariff of fees, s. 3; the Tariff of fees of members of the Corporation of Forest Engineers, s. 1; the Tariff of fees of notaries, s. 1; the Tariff of fees of urbanists, s. 1.

[44] Mémoire de l'Ordre des arpenteurs-géomètres du Québec sur le principe de la tarification (Brief presented by the Order of Land Surveyors of Québec on the principle of tariffs), December 1975, p. 2.

Today, the minimum tariff is still the most sought after: of the 24 corporations represented at the public hearings held by the *Office*, 17 were in favour of a particular type of tariff and 12 of these supported a compulsory minimum tariff.[47] Of these 12 corporations, 6 had been using this type of tariff before the Professional Code was adopted.[48] This means that six professional corporations whose members are now free to set their fees as they see fit would like to impose minimum rates.[49]

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[45] Mémoire sur la tarification des honoraires professionnels à l'*Office des professions du Québec* (Brief on fee schedules for professionals submitted to the *Office des Professions du Québec*), November 1975, p. 2.

[46] Order of Architects of Québec, La réglementation des honoraires professionnels dans la pratique privée (The regulation of professional fees in private practice), September 1975, pp. 40-42.

[47] See the list of these 12 professional corporations in Appendix 7, "The position of the professional corporations heard during the public hearings on fee schedules". It should be emphasized that these corporations did not all agree on the method of adopting the compulsory minimum tariff. Certain corporations requested that the tariff be approved by the government on the suggestion of the corporation and not on the recommendation of the *Office*. One in particular wanted a tariff negotiated between the *Office* and the professional association representing its members.

[48] Namely, the professional corporations of agronomists, land surveyors, chartered appraisers, engineers, forest engineers and notaries.

Given the desire evinced by a good number of professional corporations to have the existing tariff system maintained and extended to those professional sectors where it is not in force, the *Office* was led to pose some basic questions concerning the true objectives of the system. Is a compulsory minimum tariff necessary to protect the public in its relations with professional services? Is it even useful? Is not its main effect rather to protect those who provide professional services? Would not the public interest be better served by measures designed to reduce the costs of professional services or keep them from increasing?

Although these questions were never discussed in public prior to the recent hearings held by the *Office*, they certainly concerned the government in the past, as proven by the sometimes considerable length of time required before certain fee schedules were approved[50] or updated[51]. The *Office* believes that the impact of compulsory minimum fees on the rates charged, and on the quality and the availability of professional services must be examined before the value of such a system vis-à-vis the public can be determined.

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[49] Namely the professional corporations of architects, hearing-aid acousticians, industrial relations counsellors, dieticians, nurses and nursing assistants and dispensing opticians.

[50] The first tariff for engineers, adopted by the corporation in 1922, was approved in 1932. The architects' tariff, which established a non-compulsory minimum rate for certain services, was proposed by the professional corporation in 1892, to be approved by the government only on March 6, 1901.

I. THE EFFECTS OF A COMPULSORY MINIMUM TARIFF ON FEES CHARGED BY PROFESSIONALS

The imposition of a minimum fee for a given service plays heavily on the cost of professional services which is a very important factor in the professional-client relationship. In addition to seriously limiting fee competition among professionals, such a measure effectively restricts the client's power to negotiate when the amount of a professional's fee is being determined. These limitations to competition and the freedom to conclude contracts seem to be to the advantage of those who provide professional services, whether the minimum fees set are slightly below, equal to or higher than the lowest fees generally found on the market.

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[51] The first tariff for engineers, approved by the government in 1932, has only been revised twice since then, in 1957 and in 1968. The land surveyors' tariff was approved in 1882 and amended at rather lengthy intervals: see above, page 31. Professor John Crispo, in a study he did for the federal Prices and Incomes Commission entitled, Fee-setting by Independent Practitioners, Ottawa, Information Canada, 1972, also noted, on page 13, that there were sometimes prolonged delays in the revision of fee schedules in Québec: The deliberate use of countervailing power by government is most common in Québec where many, if not most, tariff schedules published by groups of independent practitioners must be approved by the government before they come into effect. This sometimes leads to prolonged delays in the revision of schedules, much to the annoyance of the groups in question.

Setting minimum fees slightly lower than or equal to the lowest generally found on the market protects the members of a professional corporation against any future decrease in fees for their services as a result of an increase in supply or a drop in demand. These minimum fees thus become "floor prices" which guarantee a certain level of remuneration for professional services no matter what the market situation.

On the other hand, setting minimum fees at a higher level than the lowest generally found on the market, minimum rates equal to the average market rate, for example, gives the members of a corporation even more obvious economic advantages. The least qualified members thus have a guaranteed income which they would perhaps not otherwise be able to command. Moreover, the minimum tariff may even, in certain cases, keep on the market professionals who would normally have to make their method of practice more efficient. Inefficiency may be caused by poor work organization which unduly swells operating costs in a professional practice or office; it may also result from insufficient effort or poor quality work on the part of the professional who would thus attract only a small clientele, forcing him to compensate by charging artificially high fees guaranteed by the very minimum tariff under discussion.

Minimum fees higher than the lowest generally found on the market also work to the advantage of the more privileged professionals on the open market, such as those of wide renown or particular skill, since such fees raise the level on which these professionals base their personal rates, which are usually higher than those of their colleagues. In fact, it is generally agreed and accepted that renown and skill deserve additional remuneration. As a result, the best known and the most skilled members of a corporation can doubtless command higher fees than they would receive if there were no minimum tariff. Like real pegged prices, these minimum fees are highly profitable to professionals in private practice since they enable them to set up and maintain an inflated price structure, which in turn influences the terms negotiated by salaried professionals.

The *Office* has noted that, whether the fees set by a minimum tariff are slightly lower than, equal to or higher than the lowest usually found on the market, their basic effect is to artificially stabilize or raise fees for professional services. Whether it is used as a floor price to prevent fees for professional services from dropping or as a pegged price to boost fees, the compulsory minimum tariff will influence the price structure in favour of those who provide professional services.[52]

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[52] Commenting on the assertion that "the fee-setting activities of professional groups have not generally been a very important determinant of the level of fees", John Crispo, idem, p. 29, although his report is in favour of the principle of fee schedules for professionals, adopts the following position: "This statement seems misleading, not so much because of what it says as because of what it does not say.... But regardless of the spread in the actual fees charged above the minimum, there is a tendency for the whole structure of fees to move up together. Quite often the lead is taken by those able to extract substantially more than the tariff. Nevertheless, movements in the minima also have a marked bearing on the general level of the over-all structure. It is in this sense that one should not minimize the impact of fee schedules".

A certain analogy may be made between the practice of setting minimum fee schedules and that of resale price maintenance which was popular prior to 1950. In this latter case, the supplier suggested or imposed a price for his goods, usually a minimum price, which the distributor had to respect when selling the product to the consumer. The analogy is obviously imperfect since, on the one hand, goods cannot be equated with services, and, on the other hand, the resale price is set by private agreement between the suppliers and the distributors rather than by public regulation. There are nevertheless many points in common as far as price control is concerned and it is therefore interesting to note that the Committee to Study Combines Legislation, requested to look into the consequences of this practice, concluded that it had an inflationary effect on the price of the goods concerned:

> In the light of this evidence and of current information presented to the Committee, it seems clear that, while most schemes of maintained prices may provide only fair margins to the high-cost distributor, the general level of prices is higher with resale price maintenance than it would be if competition existed.[53]

This same point was made, during the public hearings held by the *Office*, by the two groups which represented directly the interests of individuals and companies who use professional services. The representatives of the Consumers' Association of Canada (Québec), for instance, when submitting their brief to the *Office*, pointed out that the main purpose of minimum tariffs is to protect the interests of the professionals, not the interests of consumers.[54] In the same vein, the *Conseil du patronat du Québec* states in its brief that minimum tariffs fixed, or even suggested, by the State in its opinion necessarily create inflationary repercussions on the entire profession.[55]

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[53] Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, Ottawa, the Queen's Printer, 1952, p. 69. As a result of this report, which suggested that "it be made an offence for a manufacturer or other supplier to recommend or prescribe minimum resale prices for his products", idem, p. 71, the Combines Investigation Act, R.S.C. 1952, c. 314, now R.S.C. 1970, c. C-23, was amended making it an offence "to fix minimum resale prices, although suggested resale prices were still allowed": see Economic Council of Canada, Interim Report on Competition Policy, Ottawa, the Queen's Printer, 1969, p. 57.

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[54] Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée (Shorthand record of the public hearings held by the *Office des professions du Québec* on the regulation of professional fees in private practice), vol. 5, p. 1085. It should be pointed out that the Professional Corporation of Chartered Appraisers has implicitly recognized the protectionist nature of its minimum tariff. In its Rapport d'activités 1975-1976, p. 32, it concludes a recommendation entitled "When will there be a bureau to protect professionals?" with the words, "So when will there be a bureau to protect professionals? Its first duty could be to study the fee schedules for chartered appraisers which have not been revised since 1972!"
The Québec Bar also emphasizes the protectionist nature of a minimum tariff in its brief entitled, La réglementation des honoraires professionnels dans la pratique privée (The regulation of professional fees in private practice), December 1975, p. 13: "The minimum tariff is more likely to protect the practitioner than the public".*
In the United States, the American Bar Association spoke out against compulsory minimum tariffs some time ago. In 1937, the association's Committee on Professional Ethics stated in its Formal Opinion 171: "But a binding obligation to adhere, regardless of circumstances, to a rate chart or published tariff of fees for legal services is contrary to the genius of the profession as well as to its best traditions. Hence, no lawyer should permit himself to be controlled by an obligatory minimum fee schedule nor should any bar association undertake to impose such restrictions upon him." This passage is quoted from "American Bar Association and Justice Department Explain Positions on Minimum Fee Schedules to Senate Subcommittee", 59 American Bar Association Journal, p. 1296.

* All the briefs submitted to the *Office* were in French. Any excerpts from briefs or the shorthand record of the public hearings quoted in this report have been translated for the reader's convenience.

The inflationary effect of the minimum tariff is more evident when the minimum fees set tend to be higher than the lowest fees generally found on the market. It can therefore be assumed that the minimum fee schedules now in force have caused the cost of professional services to rise since everything seems to suggest that, when they were determined, the fees in the schedules did not correspond to the lowest fees generally charged.

This conclusion is based first of all on the various arguments brought forward by the professional corporations to justify the existence of a minimum tariff, which, as we shall see later,[56] tend to make a connection between the quality and availability of services and a guaranteed fee level which enables professionals as a group to earn a suitable income.

In addition, a quick look at the tariffs and their application suggests that, as a general rule, fees today are still higher than the lowest a good number of professionals could normally ask were there no tariffs. Consequently, at the time of their adoption, these fees must have been about equal to the average rate on the market. The most common method of calculating fees in these schedules is by the unit of time it takes to render a service.[57] In addition to the reimbursement of the salaries of the employees who have helped render the service, increased by 150% to cover general expenses,[58] this method of calculation usually provides for the reimbursement of all the professional's expenses as well as a minimum fee of between $120 and $150 per six-hour day or $20 to $30 an hour.[59]

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[55] Mémoire sur la réglementation des honoraires professionnels dans la pratique privée, November 1975, p. 7.

[56] See sections II and III of this chapter.

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[57] The only tariff not calculated in this manner is the Bar's tariff; see Appendix 2, Regulation of the Bar, ss. 86-89.

[58] This 150% is also found in the order in council establishing the conditions of remuneration for engineers and architects in private practice under contract to government agencies; see note 30. In 1970, the professional corporations of engineers and architects, at the specific request of the government, had Clarkson & Gordon, chartered accountants, carry out a study on the proportion of professional fees charged by the hour or by the day that covered general expenses.
On the basis of the very cautious conclusions of this study, dated April 14, 1971, it may be deduced for the purposes of our discussion that 150% is definitely not the absolute minimum required by a firm of engineers or architects. Moreover, this conclusion is implicit is the fact that, in the actual terms of this report, "most of the firms declare themselves satisfied with the 150% increase to cover general expenses, specifically, 61% of the engineers and 74% of the architects (who seldom use it)".

[59] See, for example, Appendix 2, the Tariff of fees for members of the Corporation of Land Surveyors and Geometers, ss. 2 and 3; the Regulation of the Corporation of Chartered Appraisers, Division XI, "Tariff of professional Fees", ss. 11.2-11.4; the Engineer's tariff of fees, ss. 19-27; the Tariff of fees of members of the Corporation of Forest Engineers, sec. 1(a).

Considering that most of these tariffs were last revised from 3 to 8 years ago and that, given the high rate of inflation in recent years, the fees set could, on a strictly mathematical basis, be increased by 25% to 50%,[60] it is significant that in some professions not only have the fees not been raised in these proportions but they seldom differ greatly from those stipulated in tariffs which are theoretically outdated.[61] These facts tend to demonstrate the relatively high level of rates fixed by the minimum fee schedules adopted prior to the Professional Code.

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[60] The Order of Land Surveyors, whose most recent approved tariff dates from March 1973, estimates in its brief, supra, p. 20, note 44, that its tariff should be increased by 50%: "Moreover, it must be specified that the existing tariff of the Order is essentially a minimum tariff based on the December 1971 consumer price index in Québec City. Normally it should now be increased by 50%".

[61] The president of the Order of Notaries, during the presentation of the corporation's brief to the *Office*, stated that the notaries' tariff of $30 an hour, established in 1972, is still generally respected: "In general, the hourly $30 rate given in the tariff is respected. Agreements are very rare; it's very rare that a client comes to the office and you tell him that such and such a thing has to be done and that you refuse to do it for less than $50 or $60 an hour. It's very rare. Most of the time, the tariff is decided once the work has been completed and since the notary has no special agreement with his client, he has to apply the $30-an-hour rate; that's usually how it works." Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, volume 6, p. 1245. Apparently, some of the members of the Corporation of Chartered Appraisers also continue to respect the hourly rate of $25; witness the statement by one of the representatives of the corporation before the *Office:* "As the profession is practised today, in 1976, although our tariffs go back to 1972, really to 1965, the $25-an-hour rate is generally asked - in private practice, I am not talking about dealings with the government - by novice appraisers or by appraisers who are not very well known. If a client goes to a well-known appraiser, the appraiser is obviously not very likely to accept a job for $25." Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, volume 4, p. 780.

Certain corporations that requested maintenance of their minimum tariff actually let it be more or less understood that the fees set in the tariff were relatively high when they were adopted by admitting that these fees often became, in practice, the only ones asked. As the Order of Engineers explains in its brief, "because of the competition between engineers, the minimum tariff very often becomes a maximum tariff, to the public's advantage".[62]

The Order of Hearing-Aid Acousticians, a new professional corporation with exclusive rights to practice, created in 1973, when requesting the adoption of a minimum tariff for its members actually felt the need to spell out in its brief its desire to break with what it considers to be the Québec tradition of fees set by minimum tariffs:

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[62] Supra, note 45, p. 6. The brief submitted by the Order of Forest Engineers entitled La tarification professionnelle dans la pratique privée (Professional tariffs in private practice), November 1975, p. 15, makes a similar statement: "Given the increasing tendency to request submissions before contracts are granted, the tariff of minimum fees tends to become a tariff of maximum fees for the person who seriously wants to get the job. In these circumstances, the tariff of minimum fees puts a brake on the consultant who would try for the job at any price."

> The Order's concept of a minimum fee schedule differs from the traditional concept in that the Order does not believe a minimum fee schedule, barring exceptional circumstances, should exceed the professional fees hearing-aid acousticians would receive in a competitive system.[63]

Measures taken by the public authorities to maintain or raise the fees for professional services by the use of minimum tariffs are particularly subject to reservations since they favour a group whose income is generally already far higher than that of most workers in our society.

We must carefully avoid making an analogy here between the minimum wage of salaried employees and the minimum tariff of professionals in private practice. The minimum wage is basically a social measure to protect those workers who are usually neither specialized nor unionized and who, left to their own devices, would never be certain of an adequate income since they cannot exert much pressure on the enterprises that hire them. Unlike the workers who enjoy this protection, the professionals interested in the establishment of a minimum tariff belong to a specialized labour force whose collective interests are furthered by professional corporations and associations which have been given often very broad powers of negotiation and pressure.[64] The high income they generally earn is clear proof of this fact. In this respect, it is worth noting that, in 1974, statistics available on professionals in private practice revealed that the average income of architects, engineers, physicians, dentists, lawyers, notaries and accountants in private practice in Québec amounted to $42,634 after expenses related to professional practice had been deducted, while the average income of the Québec taxpayer was $10,303.[65]

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[63] Mémoire de l'Ordre des audioprothésistes du Québec à l'*Office des professions du Québec* sur la tarification professionnelle (Brief presented by the Order of Hearing-Aid Acousticians of Québec to the *Office des professions du Québec* on professional tariffs), December 1975, p. 18.

Given the inflationary pressures the obligatory minimum tariff exerts on fees for professional services, the *Office* does not think the tariff can be beneficial to the public as far as cost is concerned. It is argued, however, that such a tariff guarantees the quality and the availability to professional services and that the privileged position the professional occupies as a result is therefore justified.

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[64] See the study by the *Centre de recherche en développement économique* of the Université de Montréal, supra, pp. 145-146, note 14, for the distinction between the minimum wage and a minimum tariff.

[65] See Revenue Canada - Taxation, Taxation Statistics, 1976 Edition, Analyzing the Returns of Individuals for the 1974 Taxation Year and Miscellaneous Statistics, p. 122. For additional details on these statistics, see Appendix 8, "Statistics on the income of professionals in private practice". The statistics given by Revenue Canada are limited to certain classes or workers. There are other groups about which it would be interesting to have official statistics, such as company administrators and officers whose income might be equal to or even higher than the income of professionals in private practice; 1974 statistics on these groups may be found in "Rémunération et conditions de travail" (Salaries and working conditions), by Maurice Chartrand, in Le point commerce, Edition annuelle sur l'Economie du Québec (special annual issue on the economy of Québec), 1976, pp. 128ff.

The *Office* believes these arguments must be studied in order to determine whether the obvious economic disadvantages of a minimum tariff for the consumer are compensated for by higher quality and greater availability of professional services.

II THE EFFECTS OF A COMPULSORY MINIMUM TARIFF ON THE QUALITY OF PROFESSIONAL SERVICES

Professionals usually claim that a tariff which gives them an economic advantage is justified by the need to maintain high standards of quality in the services rendered. By protecting professionals from competition with their colleagues and negotiation with their clients, which could force them to lower the fees for their services, the minimum tariff is believed to fulfill a double objective: it encourages professionals to maintain the quality of their services by preventing them from reducing their fees and by guaranteeing a suitable income; and it substitutes competitive quality for competitive prices, to the advantage of those who require professional services.

This line of thought presupposes the existence, beyond a certain limit, of an almost absolute relation between the cost and the quality of services, and the existence among professionals of competition based on the quality of the services rendered. The validity of these two postulates must not be taken for granted.

A. The relation between fees and the quality of services

Several professional corporations stated during the public hearings held by the *Office* that if the fees for professional services fell below a certain level, a corresponding decrease in quality must necessarily follow. A minimum tariff was therefore essential. The Order of Land Surveyors is very clear on this subject in its brief:

> We believe that the public generally gets what it pays for, whether in professional services or other services. In our profession, in particular, any professional act performed at a discount *automatically* implies a decrease in the quality of the work. Merchandise of doubtful quality can be accepted, depending on the use to which it will be put.[66]

This point of view is shared to some extent by the Order of

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[66] Supra, note 44, p. 12 ; italics added. This statement also appears in section 1.3 of the corporation's present tariff: "Compulsory character of the tariff: Each member of the Corporation of Land Surveyors and Geometers of Québec must apply the present tariff, even when answering requests for tenders by private parties or public bodies. This tariff having been established for a just remuneration of works correctly executed according to the rules of the profession, any rebate could only be detrimental to the quality of the work, and, consequently, detrimental to the client and to public interest in general."
See Appendix 2, Tariff of Land Surveyors and Geometers of Québec.

Notaries:

> The Order of Notaries is of the opinion that the tariff is a valuable means of protecting the public since it ensures the quality of services by eliminating fee competition between members of a profession, which could lead to a degree of efficiency or quality in the service rendered inferior to the standards set by the professional corporation.[67]

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[67] Mémoire concernant la réglementation des honoraires professionnels dans la pratique privée, November 1975, p. 15. This is doubtless the spirit in which the Order of Notaries recently entrusted its professional inspection committee with the task of checking whether the corporation's minimum tariff was respected by its members. As stated in the report of the administrative committee of the Order, published in the "Rapport annuel 1975-1976 de l'Ordre des notaires du Québec" (1975-1976 annual report of the Order of Notaries of Québec), (1976) 78 Revue du Notariat June-July supplement, 1976, pp. 27-28: "The administrative committee acted upon the resolution adopted by the members of the Order at the May 1975 session, specifically: It is proposed that the assembly entrust the professional inspection committee with a mandate to study the problem of ensuring that notaries in the Province of Québec respect the tariff provisions and to make appropriate suggestions and proposals concerning the measures to be taken to this end; For example, during inspection choosing at random five files and bills which the notary would be obliged to submit."
The resolution was presented to the chairman of the professional inspection committee and the committee complied with the wishes of the Order.
Complaints have since been lodged by the syndic, on the basis of proof supplied by the inspectors, against certain notaries who grossly reduced their rates thus acting unfairly towards their colleagues.
These complaints led to condemnations, as may be seen in the disciplinary decisions reproduced in Appendix 4. On this subject, see the statement by the president of the Order of Notaries reported in "Règles de déontologie notariale et de tarification" (Rules for a code of ethics and tariffs for notaries), by Julien S. Mackay, 1976, Cours de perfectionnement du notariat (Upgrading courses for notaries) 13, p. 26.

The corollary of this line of reasoning is that the fees charged for services must be maintained at a certain level if the quality of the services is to be preserved. As explained by the Order of Architects in its brief:

> The following considerations are in no way meant to defend the interests of architects. It must be admitted, however, that there comes a point when certain limits must be respected if a desirable quality of service is to be maintained.[68]

The argument which links the quality of service to a minimum fee presumes the existence, below that amount, of a quasi-absolute relation between the fee and the quality of professional services. The *Office*, for one, does not believe this reasoning can justify minimum fee schedules for professional services. It supports its position with three arguments: (1) there are many factors which influence fees for professional services without affecting their quality; (2) a distinction must be made between a fee-quality relation and a tariff-quality relation; (3) professional services are subject to regulations whose very purpose is to maintain the quality of service.

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[68] Supra, note 45, p. 27 .

1. Factors which influence fees for professional services without affecting the quality

There are many different factors which can influence the fees charged for professional services. Some of these may influence the quality, for better or for worse; others have no effect in this respect. Without trying to enumerate all the factors or differentiate them according to the influence they may or may not have on quality, the *Office* would like to try to show that many of them can bring about an increase or decrease in the fees charged for services without automatically affecting the quality in the same way. Some of these factors are related to the actual position of the professional, others to the market situation.

Several factors, such as production costs, productivity, and the profit sought,[69] can influence the fees charged by a professional or a group of professionals without affecting the quality of the services rendered. Specific examples are: an inexpensive material organization; simplified administrative methods and procedures; rapid completion of certain tasks through specialization, for instance; division of labour among office personnel and technical assistants; even, generally speaking or in specific cases, the willingness to accept below-average remuneration in response to an ideal of public service.[70]

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[69] Other factors of this type are mentioned on pages 111-112.

Other factors, no less important, related to the market situation, such as the introduction of related competitive services or a change in the cost of such services, or a change in consumer needs can influence demand and affect the fees charged for services without necessarily affecting their quality.

Since different fees are asked for professional services which seem to be of equal quality, it is difficult for the *Office* to accept the argument that, below a certain level, a decrease in fees generally, if not automatically, results in a decrease in the quality of service. Nor is there any reason to believe that high fees are necessarily a guarantee of better quality. On this point, the *Office* shares the opinion of the Consumers' Association of Canada (Québec) which warns that care must be taken not to conclude that the higher the fees for services, the higher the quality.[71] Since the professional corporations that uphold this reasoning have given no proof of its validity, it cannot be assumed that the quality of professional services is necessarily related to the fee, even below a given level.

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[70] As Robert L. Simmons and Gary N. Holthus have pointed out in "Minimum Fee Schedules: Guides or Strait Jackets?" 1972, 21 Cleveland State Law Review, 40, p. 46, it is this very multiplicity of factors able to influence the fees charged for professional services which led the Kansas State Bar Association to question the advisability of minimum fee schedules: "The vast majority of the Kansas Bar felt that minimum fee schedules were so structured as to prevent a realistic solution to the problem of what the fee should be for a specific legal service. The Bar was perplexed with the following: (1) how a schedule, which mandates $40. per hour for miscellaneous office consultation as a minimum charge, can be as appropriate for a new lawyer of no experience or reputation and unproven ability as it is for a lawyer with the converse of all three; (2) the variation in charges between lawyers in urban and rural areas; (3) lawyers with a low, moderate, or high overhead; (4) the difference between single, dual and multiple practitioners."

2. The distinction between fee-quality relation and a tariff-quality relation

Although we have just stated that there is no systematic relation between fee and quality in professional services, it is possible, and many people believe it probable, that among the factors influencing fees for professional services there are some which necessarily affect quality in the same way. In the presence of such factors, low fees would indicate low quality and, conversely, high fees would indicate a high standard of service.

Even the existence of such a phenomenon which, it should be stressed, has not been conclusively proven, would not necessarily convince the *Office* of the efficacy of a minimum tariff in maintaining the quality of services. Rather it would indicate that, if measures are required to ensure quality, the solution would not be to control the fees asked by those who provide the services, but, on the contrary, to ensure the existence of those factors which influence fees and quality simultaneously, insofar as such factors can be recognized and then controlled by means of regulatory measures.

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[71] Consumers' Association of Canada (Québec) in collaboration with the Groupe de recherche en jurimétrie (section consommation) (Jurimetrics research group in consumer affairs) of the Law Faculty of the Université de Montréal, Consumer protection in the context of a fee determination policy for professional services, Montreal, December 1975, p. 12.

Take, for example, a profession in which high-quality services cannot be rendered without the assistance of specialized technicians who command high wages; here there is a certain relation between the fee and the quality of the services. Should it prove necessary, in the interests of the public, to adopt a specific measure to maintain the quality of these services, this measure should consist, not in setting the fees to be charged by the professionals, since this would in no way ensure that competent technicians were hired, but rather in obliging professionals to hire qualified technicians by means of regulatory or legislative measures.

In short, a natural relation on the market between fees and the quality of services would not necessarily argue in favour of the artificial regulation of fees since, in the opinion of the *Office*, the high fees observed in such a case could only be the proof of the quality, not the cause. Thus, a fee-quality relation observed in professional services would neither prove nor guarantee the existence of a tariff-quality relation since there is nothing to indicate that a minimum tariff is the best means of guaranteeing the fee-quality relation.[72]

The *Office* does not believe that the public authorities are serving the interests of the consumer when, by introducing a minimum tariff they prevent the consumer from benefiting from the reductions professionals might otherwise be willing to offer, for fear that certain fee reductions might result from a decrease in the quality of services. This is to say that there exists, to the detriment of the public, a marked discrepancy between the abuses to be corrected and the disadvantages which can result from the restrictions imposed to prevent such abuses.[73] To make the public pay in this way for a supposed guarantee of the quality of services seems particularly debatable since quality is ensured by other means which will now be analysed.

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[72] This line of argument is resumed further on, in other contexts. See pages 60 and 70-72.

[73] It is worth continuing here, with the same reservations, the analogy between minimum tariffs and resale price maintenance made on page 37. To the argument according to which resale price maintenance protects the consumer against loss-leaders, the Committee to Study Combines Legislation answered: "Resale price maintenance, by prohibiting any normal price reduction, affords an effective protection against 'loss-leaders' in the field of price-maintained goods. However, the Committee does not think that to withdraw from the retailer the right to make any price reduction is a satisfactory way of preventing unfair and excessive price-cutting. We are of the opinion that more direct and desirable weapons can be found to curb 'loss-leaders'."
Supra, note 53, p. 70 .

3. Means of ensuring the quality of professional services

There is no doubt that in certain sectors of the economy where there are few or no regulations to guarantee the quality of goods and services, extreme variations in quality may be observed. The *Office* is nevertheless reluctant to believe that this is true of the professional services. Without denying the existence of variations of quality in this sector, the *Office* believes that the body of legislative and regulatory controls governing the professions guarantees the degree of quality required to protect the public.

The *Office* is of the opinion that the skill and integrity of the professional rendering a service are the principal factors determining the quality of that service. The preservation and development of those very qualities is one of the basic objectives of the Professional Code and the main justification for the power which the professional corporations have been given over their members.

As far as ability is concerned, each candidate for a profession must satisfy a certain number of conditions before being admitted to the professional corporation. In addition to possessing a basic diploma as proof of his academic training, or having equivalent preparation, he must often undergo practical training and must sometimes pass an examination on the practice of his profession.

Once admitted to a corporation, a professional must practice within the framework of a number of regulations which govern, in particular, the manner in which he keeps his records and runs his office. In addition, the professional inspection committee keeps an eye on the competence of corporation members. If it discerns any weaknesses in knowledge or skill, it may recommend that the bureau of the corporation oblige the members concerned to take further training; it may also recommend that the bureau restrict the right to practice during this period.

Professional integrity, on the other hand, is ensured by the various rules of conduct imposed by the corporation's code of ethics. The code lays down the duties of the professional towards his clients, the general public and his profession. A professional who violates a rule is brought before the corporation's committee on discipline which is empowered to impose various penalties, from a simple reprimand to the suspension or revocation of the right to practice.

In addition to these regulatory tools which are peculiar to professional legislation, there are other means of controlling professional activity which can indirectly ensure the quality of the services offered. It must not be forgotten that contracts for professional services are subject to the general rules of civil law which establish the respective obligations and rights of the contracting parties. In virtue of these rules, the professional who fulfills an obligation in an unsatisfactory manner may be prosecuted before the civil courts by his client for failure to fulfill a contract, reimbursement of fees and even for a professional error resulting in damage.[74]

The threat of such suits, particularly for professional error, which, in some cases, can only be removed by prescription after thirty years, certainly encourages high-quality service. This factor, which is important to any kind of producer, is particularly significant for professionals who are prevented by their code of ethics from either directly or indirectly, limiting their responsibility towards their clients.

It is an especially strong incentive for those professionals who, in addition to being obliged to use the best possible means of obtaining the desired results, are also obliged to achieve those results. The Order of Architects is well aware of this double obligation placed upon its members in virtue of article 1688 of the Civil Code[75]:

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[74] In cases of fraud or negligence endangering life or safety, a professional may also be tried on a criminal charge.

[75] This article reads as follows: "If a building perish in whole or in part within five years, from a defect in construction, or even from the unfavorable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss."

> Without repeating the entire discussion, we wish simply to reiterate at this point that, although the professional act must meet the required standards of competence, we as professionals are also bound, under the Civil Code, to produce results. This fact has always had a definite and undeniable bearing on the quality of the buildings in Québec.
>
> ....
>
> Let us note simply that this article of the Civil Code has always had a considerable effect on the quality of the architect's work; this point must definitely be kept in mind when discussing this brief.[76]

To the argument that measures and means of recourse guaranteeing the quality of professional services are provided by civil law and legislation governing the professions, many professional corporations in favour of a minimum tariff reply that the tariff is the necessary complement of such legislation and that it encourages professionals to accept such legislation by providing economic compensation.

In the following passage, the Order of Forest Engineers explains the need for a minimum tariff to ensure the quality of the services rendered by its members:

> If basic precautions, such as a minimum tariff, are not taken, even if the *Office des professions* suggests a suitable code of ethics, it will not be easy for us to enforce it.

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[76] Supra, note 46, p. 22.

> This is why the Order of Forest Engineers argues that a minimum fee schedule is an essential tool for ensuring public protection. In fact, if there is a minimum fee schedule guaranteeing the possibility of a suitable income for our members in private practice, we will be able to issue severe directives concerning the quality of the services rendered.[77]

The Order of Dispensing Opticians uses the same argument in a more general context:

> It seems unrealistic to suppose that minimum standards of service can be maintained solely by the strict application of regulations governing the professions. There must also be a financial incentive in professional fees to reinforce respect for these standards.
>
> .... A minimum fee schedule may be drawn up by evaluating the effect the creation of such standards by legislation and regulation has on costs. Standards of professional competence and those governing record-keeping, office management, advertising, professional behaviour, continuous training and professional inspection must serve as a guide in evaluating and establishing a minimum fee schedule consistent with the public interest.[78]

This type of reasoning, which to some extent makes the application of regulations governing professionals dependent on the existence o a minimum tariff, may be argued on at least two counts. First of a it cannot be automatically assumed that a minimum tariff is an essential complement to the means provided for controlling the professions. Under the terms of the Professional Code and the Civil Code, the pertinent regulations must be respected and liability must be accepted by all professionals without exception.

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[77] Supra, note 44, p. 17.

[78] Mémoire de l'Ordre des opticiens d'ordonnances du Québec à l'*Office des professions* sur la tarification professionnelle (Brief on fee schedules for professionals submitted to the *Office des professions* by the Order of Dispensing Opticians of Québec), December 1975, pp. 19 and 21.

The relevant provisions have the force of law and their application may be approved either by the committees on discipline and the professional inspection committees within each professional corporation or by the civil courts, depending on the circumstances. The *Office* is unable to share the point of view of the Order of Land Surveyors which believes the absence of a minimum tariff for its members would have the following consequences:

> The Order is under the strict obligation to control the quality of the professional work carried out by its members; it is not by eliminating the tariff that we will be in a position to ask our members to perform work of a quality in keeping with public protection.
>
> Were a professional inspector to inform a colleague that some professional act on his part was sub-standard, the colleague could very well reply that the client had got his money's worth, that he paid for what he got.[79]

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[79] Supra, note 44, p. 17.

The *Office* believes that the coercive nature of the methods of controlling professional work suffice to ensure the quality of professional services and that, all in all, it would be unwise to add a compulsory minimum fee schedule. As will be seen further on,[80] it is by no means clear that the quality of professional services is necessarily maintained or improved as a result of the financial security or the additional remuneration guaranteed professionals by such a tariff; in the final analysis, where quality is concerned, it is impossible to say whether a minimum tariff serves as an incentive or a deterrent.

The second point the *Office* cannot accept is that the minimum tariff provides the economic compensation necessary to persuade professionals to accept the controls imposed on their work. As far as the *Office* is concerned, such compensation clearly exists already in the form of the exclusive rights to practice and the reserved titles granted the professions by the State in the pertinent legislation.

Moreover, despite the assertions made by the professional corporations several times during the hearings, it has not been proven that a minimum tariff actually corresponds to the costs incurred in meeting the norms set by the controls over professional work. On the contrary, no objective criterion seems to have been used in setting the tariff. This is more or less the conclusion reached by Professor John Crispo in his study on fee-setting by independent practitioners:

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[80] See pages 70-72.

> The most disturbing feature to emerge from this study concerns the inability of the various groups involved to identify exactly the bases for their conclusions that their members' services are worthy of their target net levels of remuneration.[81]

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[81] Supra, note 51, p. 29. It is interesting to note, in support of this statement by John Crispo, that in the United States studies on the level of suggested minimum fee schedules set by various American Bars show marked differences between the tariffs and the established fees which are difficult to explain. As described by Richard J. Arnould and Robert N. Corley in "Fee Schedules Should Be Abolished", 57 American Bar Association Journal, 1971, 655, p. 658: "For example, the hourly rate varies from $15. in New Hampshire to $40. in Texas. Since services covered by the general hourly rate are essentially the same, do jurisdictional differences justify this spread? The minimum fee for the minimum and usual services performed by an attorney in the formation of a corporation capitalized at $50,000. ranged from $200. in New Hampshire to $525. in Philadelphia. Per diem rates for trial work in a state district court range from $50. in New Hampshire to $300. in Illinois, Wisconsin, Michigan, and Dade County, Florida. One of the greatest differences in minimum fees found was the retainer fee for a felony. In North Dakota it was $150. compared to $2,000. in Illinois.... We submit that these differences establish a prima facie case of unreasonableness."

In a similar study, "Minimum Fee Schedules: Guides or Strait Jackets?", supra, p. 41, note 70, Robert L. Simmons and Gary N. Holthus note equally remarkable differences not only within the country but within a single American state: "For purposes of illustration let us compare the high minimum fee schedule and low minimum fee schedule in California, New York and West Virginia for an uncontested divorce. The high minimum fee in California is one thousand dollars ($1,000.) with the low minimum fee within that state set at two hundred dollars ($200.). West Virginia has a high of two hundred and fifty dollars ($250.) and a low of seventy-five ($75.). New York finds itself somewhere in the middle with a high minimum fee of five hundred ($500.) and a low of two hundred and fifty ($250.). In viewing the present state of the economy, the difference in the economic standards of these geographic areas in relation to the tremendous disparity in minimum fee schedules, throughout the country, one can only conclude that the vast majority of these schedules are unreasonable, overly restrictive and arbitrary."

It could be just as easily assumed, again without proof, that the minimum tariff corresponds much more to the will of the profession as a whole to have a certain guaranteed level of remuneration than to the costs entailed by the application of the laws and regulations governing the professions.

The *Office* does not deny that the control of professional work may incur heavy costs for each individual practitioner. Annual dues and the cost of abiding by certain by-laws of the corporation - keeping records, administering an office, obtaining professional liability insurance - are obvious examples. The *Office* is also well aware that private practice as opposed to a salaried position involves financial risks and a degree of professional responsibility which should receive economic compensation. However, since this is true for all the members of a professional corporation in private practice, it may be supposed that costs are reflected in the scale of fees of each and are passed on to the clients just like all the other expenses related to the services rendered.

Given the context, a minimum tariff simply sanctions the obvious necessity for professionals, in their own interest, to include in thei production costs the costs resulting from regulations governing their profession. The *Office* does not believe such a tariff would contribut anything to the protection of the public since there is nothing to indicate that without financial protection professionals would be tempted to ignore regulations and dispense sub-standard service.

On the contrary, a number of facts, both in Québec and in the other Canadian provinces, seem to argue against any kind of relation between the existence of a minimum tariff and the quality of the professional services rendered. First of all, the quality of the services rendered by the members of the professional corporations which have a compulsory minimum fee schedule and are requesting that it be increased does not seem to have deteriorated, despite the inflation which the corporations say is making the tariff increasingly inadequate. In fact, the *Office* has no data to indicate that the gradual decrease in the effectiveness of the minimum tariff as a means of maintaining fees has contributed to a reduction in the quality of professional acts.[82]

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[82] Some professional corporations in favour of a compulsory minimum fee schedule, such as the Professional Corporation of Chartered Appraisers, even implied the opposite during the public hearings. The following is a dialogue between the chairman of the *Office* and the chairman of the committee on fees of the Corporation of Chartered Appraisers:

> "The chairman of the *Office:*
> 'Suppose someone charges the minimum fee given in the 1972 Official Gazette. Do you think that at that price the quality of his work is necessarily doubtful?'
> The corporation representative:
> 'No, no.'
> The chairman of the *Office:*
> 'Good. That means then that technically, you can charge less than the minimum.'
> The corporation representative:
> 'It means that the quality of the work is maintained and that the appraiser endures the present situation.'"

Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, Volume 4, pp. 767-768.

Similarly , the *Office* has no reason to believe that the 21 professiona corporations which did not have a compulsory minimum fee schedule prior to the Professional Code had occasion to complain of a general failure to respect regulations or poor quality service from their members. The presidents of two of the oldest professional corporations in Québec actually made a point of specifying at the public hearings that they saw no correlation between the quality of services and the existence of a tariff. The president of the Professional Corporation of Physicians, for instance, said:

> I would like to clarify a point on which other corporations before us have been questioned and which concerns the equation between quality and tariffs. In our opinion, there is ... no correlation between quality and tariffs. Whether a professional works for a salary or is paid by the act, receives a small fee or a large one, earns $10,000 or $50,000, I think the quality of his work, the quality of his acts, must always be the same and must always be acceptable; it's a question of professional ethics.[83]

The president of the Québec Bar took the same stance:

> I do not think a minimum degree of quality is dependent on a minimum tariff. I am quite clear on that; I do not believe it.[84]

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[83] Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, Volume 6, pp. 1317-1318.

[84] Idem, Volume 5, p. 1009.

The Order of Podiatrists, a new professional corporation with exclusive rights to practice, created in 1973, expressed a similar point of view:

> The Order has never claimed and does not now claim that a tariff of some sort will serve as a means of preserving and guaranteeing the quality of professional acts or of justifying the client's bill.
>
> .... The Order, which is an exclusive professional corporation, possesses the means necessary to ensure the quality of podiatric services, notwithstanding the effect of any tariff.[85]

A rapid examination of legislation in the other Canadian provinces whose laws governing the professions were inspired by the same sources as Québec's reveals that fee schedules, minimum or otherwise, are not generally included in the means law-makers give professional corporations for controlling the quality of services rendered in private practice.[86] Ontario legislation, for example, provides for the establishment of regulatory tariffs only for certain acts performed by solicitors,[87] and legislation in British Columbia, only for the professional services of architects, land surveyors and dentists.[88]

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[85] Mémoire au sujet de la réglementation des honoraires professionnels des podiatres, dans le contexte de la pratique privée, (Brief on the regulation of the professional fees of podiatrists in private practice), November 1975, pp. 4 and 8.

[86] See Appendix 9, "Professional corporations legally empowered in other Canadian provinces to set tariffs of fees by regulation.

For these various reasons, the *Office* does not believe that a compulsory minimum fee schedule for professional services is a necessary complement to the already existing controls over quality. The power the professional corporations have been given in order to maintain the competence and integrity of their members at a satisfactory level, in addition to the recourse the public has under civil law, should suffice to guarantee the quality of the services offered, no matter what the fluctuations in cost.

There is therefore room to greatly attenuate, not only the almost absolute character certain professional circles want to attribute to the fee-quality relationship but, more particularly, the importance of a tariff as a guarantee of this relationship. It seems hardly realistic to believe that the effects on professional fees of the absence of a minimum tariff might lead professionals to perform acts whose quality is inferior to the standards demanded by their professional corporation for the protection of the public.

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[87] The Solicitors Act, R.S.O. 1970, c. 441, ss. 14 and 15; these sections authorize the establishment of a tariff for conveyancing matters. In the United Kingdom, the source of our law governing the professions, the situation of regulatory tariffs seems to be about the same as in Ontario; see The Monopolies Commission, A Report on the General Effect on the Public Interest of Certain Restrictive Practices so far as They Prevail in Relation to the Supply of Professional Services, Part 1: The Report, London, Her Majesty's Stationery Office, 1970, pp. 33-34. The name of this commission was recently changed to Monopolies and Mergers Commission by the Fair Trading Act, U.K., 1973, c. 41, s. 4.

[88] In a number of provinces, various professional corporations and associations have prepared fee guides. These, however, have no legal force and, in principle, only suggest or recommend fees.

If, despite the powers given the professional corporations, the quality of the services rendered by professionals were to suffer by reason of the lack of a protective tariff, it is the principle of self-management that would have to be reconsidered. It is the belief of the *Office* that to draw an absolute relation between the quality of service and a price guaranteed by a fee schedule implies a denial of the methods for controlling professional work which are the basis of the privileges, such as self-management and monopolies of practice and titles, granted the professions.

B. Competition based on the quality of the services rendered

The second argument in favour of giving a minimum tariff a leading role in ensuring the quality of professional services is clearly summarized by the Order of Notaries:

> Note that the tariff also serves to prevent fee competition among practitioners. It thus helps keep competition among practitioners on a basis of professional competence and quality of service. The public is thus better protected.[89]

There are two major reservations to this reasoning. First of all, to claim that a minimum tariff substitutes quality for cost as a basis for competition among professionals is to pose a paradox which seems to undermine the justification for the right to self-management the State has given the professionals. The major reason professionals are left to manage their own business is that the general public is unable to judge the quality of the professional services it receives. Using the same logic, there is little reason to presume that the public could encourage competition based essentially on appreciation of this very quality. This paradox has also been pointed out by the members of the Monopolies Commission in the United Kingdom:

> The argument that regulation of price competition leads to better quality might carry more conviction if it were apparent that practitioners were encouraged to compete in quality of service by pressure from clients capable of judging quality. But most professions argue that the public frequently lack the ability or the knowledge by which to judge the relative merits of professional services and need, therefore, to be protected from exploitation.[90]

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[89] Supra, note 67, p. 16.

[90] Supra, note 87, p. 27.

Even the advocates of consumer sovereignty concede that the uninitiated are unable to appreciate the quality of professional services and must therefore rely on the professional himself.[91] Not only is the professional able to determine, to a large extent, the number of services required[92] by a client, but he is often also the only person able to judge the quality of those services. This type of client-professional relation, particularly evident in the health sector, seems to apply to a large number of professional services. Since the general public, and particularly the individual consumer, is unable to judge the quality of the professional services rendered, mainly because of lack of information, the effectiveness of quality competition is doubtful from the start.

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[91] Along these lines, see J.-L. Migué and G. Bélanger, *Le prix de la santé* (The price of health), Montreal, Hurtubise, 1972, pp. 19-33.

[92] The professional's ability to "create" demand, that is, to create or increase his clients' need for his services, was the subject of recent economic studies in the health sector. See the study by J. G. Boutin and J. Bisson, *Consumers and Health Costs in Québec from 1971 to 1975*, Québec, *the Health Insurance Board*, 1977, and the criticism of this paper made by the Federation of Medical Specialists of Québec on February 24, 1977, entitled *Comments of the Federation of Medical Specialists of Québec on "Consumers and Health Costs in Québec from 1971 to 1975"*, published by the Québec Health Insurance Board; J.-L. Migué and G. Bélanger, *idem*, pp. 19-33 and 121-124; R.G. Evans, *Price Formation in the Market for Physicians Services*, a study prepared for the Prices and Incomes Commission, Ottawa, Information Canada, July 1972, pp. 31-68; R.G. Evans, E.M.A. Parish and Floyd Sully, "Medical Productivity, Scale Effects and Demand Generation", 1973, *Canadian Journal of Economics*, pp. 381 and 392-393; V.R. Fuchs and M.J. Kramer, *Determinants of Expenditures for Physicians' Services in the United States 1948-1968*; DHEW Publication no (HSM) 73-3013, December 1972, pp. 24-25 and 35-36; M.S. Feldstein, *Economic Analysis for Health Service Efficiency*, Amsterdam, North-Holland Publishing Company, 1967, pp. 187-222. The professional's ability to create a demand for his own services is not directly proven in these studies. At the most, it is observed that demand responds to and adapts automatically to supply. The authors put forward two interpretations of the situation: either the professional is actually able to influence demand, or he is not, in which case the overall supply of services is obviously not sufficient to meet demand. According to the *Office*, in both cases, the concept of quality competition encouraged by the consumer seems largely fictitious anyway, and a compulsory minimum fee schedule would only aggravate a situation which is already unfavourable to the consumer.

Secondly, the *Office* would like to point out that there does not seem to be anything to indicate that the creation of a minimum fee schedule, by preventing price competition, would actually stimulate quality competition among professionals. Neither the professional corporations nor their members are able to show how this could be achieved, much less guarantee the results of such a step.

It is obvious to the *Office* that the financial security provided by a minimum fee schedule cannot alone free professionals from all concern over profits and divert their efforts entirely towards the quality of the services they render. It cannot be taken for granted that the minority that would be inclined, on a competitive market, to sacrifice quality for profit would actually be dissuaded from doing so by the simple existence of a minimum fee schedule. Even if such a schedule were applied, it may be presumed that the professionals in question would be unable to resist the temptation to reduce productio costs in order to increase their margin of profit.[93]

It is difficult to appreciate the effect a minimum fee schedule might have on the quality of the services of the remaining professionals, who constitute the great majority of the members of the professional corporations. It may be argued that a minimum fee schedule maintains and strengthens the motivation to provide high-quality services. It could just as easily be argued, however, that by eliminating price competition, one of the few forms of competition likely to have an effect on the professional services market, a minimum fee schedule would sooner or later bring about a decrease in the quality of the services offered.

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[93] The members of the Monopolies Commission in the United Kingdom, supra, pp. 26-27, note 87, replied in the following manner to a similar argument according to which a recommended minimum fee schedule leads to competition which tends to improve the quality of the services offered: "No professional body does or could offer a guarantee to the public, in the sense of indemnifying clients when quality of service falls below standard. It can be argued, therefore, that a recommended scale of charges does not in itself remove temptations to reduce cost and increase profit by cutting the quality of the service." The same observation is found in an anonymous article entitled "A Critical Analysis of Bar Association Minimum Fee Schedules", (1972) 85 Harvard Law Review, 971, p. 984, dealing with the minimum fee schedules recommended by the American Bars: "Although some lawyers may feel obliged to work harder when paid more money and others may welcome resources which facilitate improved performance, still others might treat higher fees as a windfall and devote no more resources to legal tasks than they would were fees competitive and lower. Clients patronizing these latter attorneys receive no better quality than under a regime of competitive pricing." Robert J. Bertrand, federal Associate Deputy Minister of Consumer and Corporate Affairs and Director of the Bureau of Competition Policy reached a similar conclusion, as can be seen on p. 5 of a speech entitled "Amendments to the Combines Investigation Act Affecting the Legal Profession" given on January 28, 1977, before the Canadian Bar Association, British Columbia Section: "A system of regulated prices does not in itself eliminate temptations to reduce costs thereby increasing profits through the lowering of the quality of the services provided. It is submitted that no form of price regulation in itself will guarantee levels of professional integrity."

In fact there is a strong possibility that, deprived of price competition, professionals with a minimum fee schedule would feel little inclination to practice in a dynamic, efficient or original manner, given the guarantee of a certain level of income regardless of the number or the quality of the services they render. This was the conclusion reached by Sylvia Ostry, Federal Deputy Minister of Consumer and Corporate Affairs, who sees the following consequences arising from the restrictions in competition imposed by tariffs of professional fees:

> The elimination of price competition has, as I have indicated, major implications for efficiency, for innovation and change, and for costs and prices in the industry. The attempt to impose a given fee structure, moreover, can lead to severe distortions with respect to allocation of time and talent within a profession.[94]

Thus, it can easily be pointed out to those who claim that a minimum fee schedule can encourage professionals to render high-quality services that, sooner or later, such a tariff would probably have just the opposite effect. Being aware of this possibility, the

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[94] "Competition Policy and the Self-Regulating Professions", speech given at the conference on The Professions and Public Policy, Toronto, October 16, 1976, p. 21. During the same conference, R.E. Olley, Vice-President of the Consumers' Association of Canada, expressed a different point of view in a paper entitled "The Future of Self-Regulation - A Consumer Economist's View Point", Toronto, October 16, 1976, p. 13.

Office can hardly conclude that a minimum fee schedule would be a useful measure.

In short, the *Office* does not believe that a compulsory minimum fee schedule can ensure the quality of the services rendered by professionals in Québec. It would be inappropriate, superfluous and risky to introduce such a tariff with that end in view: inappropriate because while supposedly guaranteeing the quality of the services offered the public, the tariff would at the same time oblige the public to defray the cost of the "guarantee" thereby restricting financial access to these services; superfluous, because the means to ensure the quality of services already exist in the legislation governing the professions and in Québec civil law; risky, because there is nothing to prove that the minimum tariff actually works in favour of and not against high-quality professional services.

III. THE EFFECTS OF A COMPULSORY MINIMUM FEE SCHEDULE ON THE AVAILABILITY OF PROFESSIONAL SERVICES

It was often argued during the public hearings that a minimum fee schedule, by giving professionals a high level of remuneration, guaranteed the existence of a qualified and sufficiently large professional corps and thus ensured that professional services would be available to all. The Order of Agrologists*, which is in favour of maintaining its present minimum fee schedule, expressed the belief that the tariff must be regulated to a certain extent if qualified professionals are to be encouraged to enter private practice.[95] Along the same lines, the Order of Forest Engineers stated that:

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* The Agronomists Act (R.S.Q. 1964, c. 260) was repealed with the coming into force of the Agrologists Act (S.Q. 1973, c.58)

> The client has the right to choose the forest engineer he wishes to consult. He must be given a choice. He must be protected, however, by a minimum fee schedule. In addition to ensuring that the price is fair, such a tariff assures the client of continued services, readily available over a long period of time, from a well-established firm.[96]

The *Office*, however, is by no means convinced that the application of a minimum fee schedule would definitely increase the availability of professional services. Although there is no disputing the fact that an income considerably above the average is of interest to potential practitioners, it is nevertheless going too far to claim that if a profession has no minimum fee schedule it will lose much of its attraction on the market.

Both in Québec and in the other Canadian provinces, several professions whose members are not protected by a minimum fee schedule are obviously attracting students, both because of the interesting career offered and because of the income and prestige which are in any case part and parcel of the profession. Moreover, many professions which have a minimum fee schedule in Québec have no such protection in many of the other Canadian provinces; yet there is nothing to suggest that any difficulty in recruiting is experienced in those provinces. This is true particularly for agronomy, land surveying and engineering.[97]

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[95] Avantages et inconvénients pour la protection du public, d'une réglementation des honoraires professionnels dans la pratique privée (Advantages and disadvantages for the public of regulating professional fees in private practice), December 1975, p. 6.

[96] Supra, note 62, p. 17.

The *Office* believes that if the legislation governing the professions is to be used to control the availability of services, it must begin with the requirements for admission to professional corporations.[98] Particularly severe criteria for admission, imposed by reason of the increasingly high standards of quality desired, can serve to limit the supply of services to the benefit of established professionals. Moreover, the desire to offer superlative services in all cases does not necessarily correspond to the needs of the public, which may be satisfied in many cases with simpler and less costly services.

Other arguments have been brought forward by various corporations in support of a minimum fee schedule as a means of ensuring the availability of professional services: for instance, a tariff would enable professionals to introduce and maintain services in isolated regions; it would ensure the survival of small offices competing with larger firms; it would protect professionals whose services are purchased by companies and institutions. Each of these arguments must be examined.

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[97] See Appendix 9.

[98] See pp. 205-215.

A. Introducing and maintaining professional services in isolated regions

According to certain professional corporations, a minimum fee schedule ensures a better distribution of professionals throughout Québec by providing sufficiently profitable work for practitioners in any region of the province. As explained by the Order of Land Surveyors:

> It is thanks to our present tariff that there are resident land surveyors in economically weak regions; we even have practitioners in our most isolated regions. If an adequate tariff did not exist, would these professionals be willing to make the sizeable investment (about $30,000) required to open a practice in an isolated or economically weak area? If there were no tariff, would we not, on the contrary, witness the exodus of professionals from such regions towards major urban centres?[99]

The *Office* finds it hard to see how a minimum fee schedule could play a useful role in this respect. A minimum fee schedule could only contribute to an improved regional distribution of professional services if the fees charged in isolated regions were lower than those charged in urban regions.

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[99] Supra, note 44, p. 13.

In fact, supposing that fees for services in an isolated region were equal to or higher than fees in the city and that there were still not enough services offered in that region, it would have to be concluded that the level of the fees was not the only reason for the lack of interest in the region on the part of professionals. It may be presumed that other factors come into play, such as isolation and the inconvenience it entails as regards transportation, communication, professional and social life, etc.[100]

The disadvantages inherent in isolation might be compensated for by increasing the minimum tariff, but, since this tariff applies to the entire province, the consequent increase in urban areas would doubtless encourage professionals to remain in the city. The only result of an increase in the minimum fee schedule would therefore be a general rise in fees for professional services which, in the end, could only work against accessibility.

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[100] In this respect, it should be noted that the introduction of a health insurance plan under which physicians are reimbursed on the basis of a fixed tariff does not seem to have helped solve the problem of regional distribution of physicians in any permanent manner, despite the increase in demand created by free services. Such at least, is the gist of page 7 of a speech entitled "Priorités dans le domaine de la santé au Québec" (Priorities in the health sector in Québec) given by Jacques Brunet, Deputy Minister of Social Affairs, on June 6, 1976, at the interdisciplinary conference on health organized by Critère: "Unfortunately, neither health insurance nor the other measures I have mentioned have as yet succeeded in solving the problem of the geographic distribution of physicians. They have nevertheless contributed to a marked improvement in the situation". For further details, see note 102.

A minimum tariff would therefore appear to be useful only when the fees charged for professional services in isolated regions are lower than in urban areas. A minimum fee schedule introduced to bring fees in those regions closer to the rates charged in the city would not necessarily result in an increase in the fees charged in urban areas. At first glance, it would therefore seem that a minimum fee schedule which raised the income of professionals practicing in isolated regions could serve as a valid means of introducing and maintaining professional services in those regions.

A more serious analysis of the situation, however, reveals that an increase in the minimum fee schedule under such circumstances is less than likely, in the end, to make services in isolated regions more widely available. Specifically, an increase in the tariff could lead to one of two situations: either demand for the services would drop and the advantages of the increase for the professional would thus be lost; or demand would remain at a profitable level for the professional.

In the first case, where demand drops in exact or exaggerated proportion to the increase in fees, because the consumer does not consider the services offered essential or is able to find a substitute, for instance, the professional cannot profit from the new tariff since his total income remains unchanged or decreases.

Moreover, since the consumer must pay more for the services to which he is entitled, accessibility is necessarily reduced. In such a case, the minimum fee schedule does not serve to increase regional distribution of services.

In the second case, where demand remains at a level profitable to the professional despite the increase in fees, any regulation is superfluous since the law of supply and demand alone enables the professional to raise his fees sufficiently to obtain the desired profit. In this case, a minimum fee schedule is simply pointless; all it does is confirm a situation which is the spontaneous result of the law of supply and demand.

In conclusion, bringing fees charged in isolated regions into line with those charged in urban areas by means of a minimum tariff would not seem to be an effective means of increasing the availability of professional services in such regions since it would prove to be either inoperative or superfluous.

This conclusion is equally worth considering for those who, faced with the problem of the regional distribution of services, would be tempted to recommend that a special, higher minimum fee schedule for services rendered in isolated regions be set within a minimum tariff applicable to the entire province. Quite apart from all considerations of the advisability of a measure which would introduce discrimination among the different regions, the *Office* believes it has already shown that any such tariff would very likely prove to be either inoperative or superfluous, depending on the effect an increase in fees would have on demand.

The *Office* is firm in its belief that the problem of the distribution of professionals throughout Québec's territory cannot be solved by measures which would oblige the consumer to shoulder the cost of increased fees for professional services. The *Office* shares the opinion expressed by the Consumers' Association of Canada (Québec):

> A fee schedule might be devised, for example, which would incite the professional to practice in areas far away from the urban centres. At present, the centralization of professional services is a well-known problem in Quebec. The very small number of professionals in these regions might be increased and practice encouraged by allowing professionals to charge higher fees in these areas. We personally do not believe that a fee-setting policy is the means of correcting regional disparities. Any increase in fees in a particular area will lead to a drop in the accessibility of the services in that region and encourage people to come to the urban centres. Moreover, the regions affected by such a policy are often the most underprivileged in Québec.[101]

The solution will be found rather in measures whose costs are more widely shared: the creation of public networks for distributing professional services; isolation bonuses or conditional bursaries;[102] the subsidization of practices in under-served regions, as suggested by the Consumers' Association of Canada.[103]

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[101] Supra, note 71, p. 13.

B. Setting up and maintaining small professional offices

In some professions, where firms of different sizes may be found side by side, it is argued that a minimum fee schedule has a role to play in the creation and survival of small offices. The Order of Agrologists, for instance, upholds the minimum fee schedule as an encouragement to the creation of new private offices and a contribution to the survival of small offices".[104] On this point, the *Office* would first like to mention that it does not agree that "small offices"[105] constitute per se a form of professional organization which must automatically be protected by the public authorities. It is a form of organization with qualities which are often attributed to small production units, namely, proximity, rapidity and personalized service; but this type of office is not without its disadvantages.

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[102] Such bursaries are given health professionals working in areas where services are made available under the health insurance plan. See An Act to amend the Health Insurance Act and the Québec Health Insurance Board Act, S.Q. 1974, c. 40, s. 18. The application of this section to physicians was recently commented upon by Dr. Jacques Brunet, Deputy Minister of Social Affairs, during an interview reported under the heading, "Le ministère et la santé: Bilan provisoire" (The department and health: the current situation) in Revue Notre-Dame, January 1977, p. 21: "This year, 34 bursaries were granted. We estimate that about one hundred more physicians would be needed to satisfy the most pressing needs of isolated areas. In short, I would say that, in from 3 to 5 years, the basic problem of geographical distribution should be settled".

[103] Supra, note 71, p. 13.

[104] Supra, note 95, p. 14.

Small offices are limited in professional, human and technical resources. In some cases, this deficiency may act against improved services to the public if only because team work, which is becoming increasingly important in a number of disciplines, is impossible for all practical purposes. In addition, as a general rule, small offices are less likely than larger offices to make economies of scale in production costs and, as a result, less able to charge relatively low fees for their services. Accessibility is therefore not improved.

If small offices are opened and survive on the professional services market, despite these unfavourable conditions, they obviously respond to specific needs. The *Office* does not believe, however, that it is absolutely necessary to protect and promote small offices artificially through a minimum fee policy, unless there is a very special need for public protection.

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[105] In order to avoid any ambiguity arising from the use of the expressions "small offices" and "large offices" in this text, the *Office* wishes to point out that, depending on the profession referred to, a "small office" may consist of one or several professionals. The exact implications of the expressions in question are relative.

Various professional corporations assert, in support of a policy to protect small offices through a minimum fee schedule, that the existence of such offices prevents medium-sized and large concerns from gaining control of the market, a situation which could result in an increase in fees. The Order of Land Surveyors describes how a young professional could be forced to abandon his practice if there were no fee schedule:

> If there were no tariff, a well-structured, financially strong professional firm could prevent a young newcomer from setting up a practice in the area by reducing its fees for the period of time required to discourage its new colleague. The newcomer, lacking the financial means to survive such competition, would be forced to abandon his practice. Once the young competitor had left, fees would skyrocket.[106]

According to this line of argument, the minimum fee schedule prevents big offices from gaining control of the market and subsequently raising their fees radically by prohibiting them from greatly reducing their fees in order to eliminate competitors. Since its purpose is to prevent large offices from eliminating small ones by abusive decreases in fees, a minimum fee schedule, to be effective, would have to be equal to or slightly lower than the fees charged by the large offices, or else higher than those fees.

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[106] *Supra*, note 44, pp. 12-13.

In the first case, the minimum tariff would prevent all fee reductions, no matter what the cause. It would obviously prevent large offices from deliberately decreasing their fees in order to reduce competition, but it would also eliminate justifiable reductions resulting for instance from changes in market conditions — an increase in supply, a decrease in demand, stronger competition or an increase in productivity — which would benefit the consumer.

In the second case,[107] a minimum fee schedule would entail yet more immediate disadvantages for the consumer: first of all, it would mean an increase in the fees charged by large offices; secondly, it could have the same effect on small offices, always supposing that, since the fees charged by big offices are lower than those charged by small offices, the increase in the tariff would lead the small offices to raise their fees in proportion to the increase forced upon the big offices.

Whichever the case, the *Office* has observed that a minimum fee schedule first and foremost affects the fees charged for professional services, to the disadvantage of the consumer. In the final analysis, it is the consumer who suffers from the disadvantages of a minimum fee schedule, namely, ratification of the fees now charged by large offices or even an increase in these fees.

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[107] This second possibility is feasible only if the fees charged by big offices are lower than those charged by small offices. If all the fees are on more or less the same level, there does not seem to be any reason to raise them in order to prevent a decrease by the big offices alone. If such is the case, only the first possibility, whereby a schedule of minimum fees equal to or slightly lower than the fees charged by the big offices would be introduced, is logically acceptable.

A policy to protect small offices, based on a minimum fee schedule, involves certain contradictions which, the *Office* believes, cast doubt upon the advisability of any such measure: in order to guarantee continued competition on the market for professional services, small producers are given a tariff protection which must be paid for, indirectly, by the clients of another category of producers. Although established to ensure continued competition between small and large offices and to avoid the increase in fees which could result from a monopoly, a minimum fee schedule would, to a certain extent, limit price competition and increase fees or, at least, prevent them from decreasing. The solution would thus produce some of the very ills it is intended to remedy.

It will doubtless be argued that the obvious disadvantages for the public inherent in a minimum fee schedule are less important than the disadvantages of not having such a tariff. There is nothing more uncertain in the eyes of the *Office*. On the contrary, a number of points strongly suggest that the abolition of existing minimum fee schedules would lead neither to a decrease in competition nor to an increase in fees.

In the first place, it is far from obvious that the number of small offices would necessarily drop were there no minimum fee schedule. If proof of this is required, one need only turn once again to those professions, in Québec and in other provinces, which do not have a compulsory minimum tariff. There is no need to go into the various observations that led the *Office* to conclude that the quality of professional services does not suffer from the absence of a tariff; suffice it to say that the *Office* is convinced that it is justified in doubting whether small professional offices would really be threatened by undue competition if there were no minimum fee schedule.[108]

Even supposing that the absence of a minimum fee schedule could lead to the disappearance of a certain number of small offices, competition would not for that reason automatically be weaker. It could be just as healthy, even healthier and more effective, in a context where big offices compete not with a large number of small offices but with several medium-sized offices.[109] Therefore, if small offices were to unite in the face of competition from stronger groups, competition would not drop but, rather, would be strengthened.

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[108] See pages 62-66 above and the Staff Report to the (American) Federal Trade Commission, Division of Special Projects, Bureau of Consumer Protection, Advertising of Ophthalmic Goods and Services, January 1976, pp. 59-60.

Secondly, it is important to emphasize that the coming into force on July 1, 1976, of Bill C-2, which extends the Combines Investigation Act to cover professional services,[110] reduces yet further the chances of a degree of market control by large offices degenerating into a monopoly. This act clearly forbids certain anti-competitive and monopolistic practices in professional services.[111] It need only be mentioned here that, under the act, not only the creation of a monopoly, but also various practices leading to such a result, especially mergers and abusive decreases in fees, can be prevented and punished to the extent that they reduce competition to the detriment of the public.[112]

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[109] In a recent report by the independent committee appointed by the Minister of Consumer and Corporate Affairs, entitled Dynamic Change and Accountability in a Canadian Market Economy, Proposals for a Further Revision of Canadian Competition Policy, Canada, Department of Supplies and Services, March 1976, pp. 205-206, the committee pointed out that, in the goods sector, which it analysed, a decrease in the number of competitors does not necessarily result in a decrease in competition: "First, it is maintained that price discrimination which may injure small businessmen will reduce their numbers and, as a result, also reduce competition to the detriment of the public. There are a number of dimensions to this position. There is, first, clear evidence that in some distributive trades the retail and wholesale margins have shrunk appreciably at the same time that numbers of competitors have declined. *That is, reductions in numbers of competitors have been associated with more effective competition.*" (Italics added)

[110] Supra, note 40. Note that Bill C-42,tabled on March 16, 1977, to amend the Combines Investigation Act, supra, note 40, is intended to increase the effectiveness of proceedings instituted to prevent mergers and the creation of monopolies that are contrary to the public interest.

[111] See pages 164-165 and 185-193 below.

Consequently, the *Office* does not greatly fear the creation of a monopoly giving rise to an increase in fees. It firmly believes that the dangers inherent in such a slight possibility are in no way comparable to the disadvantages occasioned by the changes in the fee structure which a minimum tariff would make necessary.[113]

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[112] It may not be easy to apply the provisions of the Combines Investigation Act when a professional firm is determined to introduce an abusive reduction in its fees in order to get rid of competitors, even if those most concerned, that is, the professionals suffering from this monopolistic practice, do all in their power to have the law respected. To this argument, however, we can reply that the same problems may arise in applying a minimum fee schedule in a similar situation. On the one hand, it may not be respected by professionals who are prepared to risk legal action rather than sacrifice the profit they make by violating the tariff; on the other hand, professionals can get around the law if, while respecting tariff rates they reduce the total of their bill by cutting down on the number of hours or acts for which they bill their client.

Given the present coexistence of offices of varying sizes in professional sectors which have no minimum fee schedule, and in view of the guarantees of continued competition offered by the Combines Investigation Act, the *Office* is convinced that the absence of a minimum fee schedule does not pose a threat to small professional offices that take dynamic action to satisfy the specific needs of a clientele. The survival of any other small offices would not justify, per se, the continuation or creation of a minimum fee schedule and the *Office* believes it would be more in the public interest to see these offices reorganize, particularly by uniting, than to give them artificial encouragement by means of a protectionist tariff set up by regulation.

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[113] Presented with a similar argument to the effect that retail price maintenance "encourages the operation of more retail outlets and exerts an influence against the concentration of economic power in the retail field", the Committee to study Combines Legislation, *supra*, note 53, p. 70, concluded as follows: "Thus resale price maintenance may perhaps contribute more to discourage efficiency than to protect small business. Moreover, the Committee believes that there will always be a place for small dealers in retailing, provided they are efficient." More recently, the independent committee appointed by the Minister of Consumer and Corporate Affairs, *supra*, p. 215, note 109, questioned the advisability of forbidding "price discrimination" in order to protect small business: "Thus, in our view, a case cannot be made for *special* discrimination legislation to protect small business, both because the general grounds advanced for such protection are unpersuasive and also because the longer-run side effects of the attempt to provide it are detrimental to the economy. However, small businesses, along with other business units, are entitled to protection against pricing behaviour that is predatory in nature or is by itself or jointly with other actions part of a pattern of artificial restraint."

C. The protection of professionals whose services are purchased by companies and institutions.

The members of some professional corporations, particularly those involved in engineering or development, sell their services individually to a buyer or a group of buyers in a strong negotiating position. Some of these corporations have placed particular emphasis on the advantages of a minimum fee schedule as a means of ensuring the availability of their members' services. As explained by the Order of Architects:

> with a minimum fee schedule it is possible to reduce the monopolistic power of a given client: the government "monopolizes" about half the services rendered by architects, for instance, and could therefore easily impose even entirely unrealistic conditions.[114]

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[114] Supra, p. 46, note 37. It is worth recalling at this point that where the purchase of professional services by the government is concerned, a regulatory tariff adopted under section 12(u) of the Professional Code would not really solve the problem raised by the Order of Architects. In fact, as mentioned on page 23, the Treasury Board and the Lieutenant-Governor in Council are empowered to set the fees paid by government departments and agencies for professional services and this fee schedule has precedence over any tariff adopted under the Professional Code. As stated in note 30, fees for architects' services purchased by the government have already been set. Consequently, they are not subject to any tariff which might be adopted under the Professional Code.

The negotiation difficulties professionals with institutions as clients might run into are doubtless real[115] and a minimum tariff may have contributed to the protection of such professionals in the past. It is interesting to note in this respect that the members in private practice of the nine corporations which decided to establish a fee schedule prior to the Professional Code all have institutions as clients and that the schedules usually set minimum fees.[116]

The *Office*, however, is not of the opinion that the difficulties these professionals may encounter in negotiating their remuneration requires special attention, in the form of a minimum fee schedule, on the part of the public authorities. It does not seem that the inequality of the forces involved could actually reduce the availability of services in any profession. Moreover, in the other provinces, it may be recalled, it has not generally been considered necessary to pass legislation granting professional corporations the power to set tariffs, even when the members of the corporations were usually engaged by institutions, and there is nothing to suggest that the availability of professional services has suffered as a result.[117]

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[115] The Monopolies Commission, supra, note 87, p. 30 , rejected the argument that the strength of big clients forces the fees for professional services down: "Against this it can be argued that large clients in particular may be in competition with one another for the services of efficient practitioners, and that this competition militates against the exercise of such pressure."

[116] See Table 1 on page 3.

In addition, the *Office* does not consider the granting of a minimum fee schedule an advisable or adequate solution to the problem. The protection such a tariff would give professionals in their relations with institutions could have adverse economic consequences for consumers. Since the fees a company pays a professional involved in the production of certain goods - fees paid engineers and architects during the construction of a building, for instance - have a direct effect on production costs, the artificial protection offered by a tariff to keep fees at a certain level is likely to affect the price of the goods and services offered the public. A minimum fee schedule therefore entails a social cost which, in the end, must be paid to a large extent by private citizens.

It is clear to the *Office* that the special difficulties involved in the professional-institution relationship require action of a particular kind, action on the part of a union of the professions involved and not on the part of the public authorities. The *Office* therefore believes that the solution closest to the economic realities of the situation would be the creation of professional associations and the negotiation of private agreements with large buyers of professional services. The *Office* is nevertheless aware that a legal framework to protect independent workers, such as professionals in private practice, similar to the one set up under the Labour Code for wage earners, has yet to be brought to the drawing board.[118]

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[117] See Appendix 9.

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[118] Some of the agencies heard by the *Office* deplored the absence of a legal framework, an absence which was felt in particular during negotiations between professionals' unions and the State concerning the creation of the social insurance and social aid plans. When it submitted its brief to the *Office*, the Québec Insurance Brokers' Federation asked the following question: "Should there not be a law which would do for independent professionals what the Labour Code does for wage earners?" Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, Vol. 3, pp. 480-481. The Association des médecins vétérinaires praticiens du Québec (Québec veterinarians' association), the Académie de médecine vétérinaire de Montréal Inc. and the Association of Equine Practitioners in Québec, on the other hand, recommended, towards the end of their brief, that a legal framework be adopted within which it would be possible to hold real discussions and conclude suitable agreements between the State and all categories of professionals: Mémoire présenté à l'*Office des professions* par l'Association des médecins vétérinaires praticiens du Québec, l'Académie de médecine vétérinaire de Montréal Inc. et l'Association des vétérinaires équins du Québec Inc. (Brief submitted to the *Office des professions* by the Association des médecins vétérinaires praticiens du Québec, the Académie de médecine vétérinaire de Montréal Inc. and the Association of Equine Practitioners in Québec, Montreal, November 1975, p. 14. Lastly, it should be recalled that the Commission of Inquiry on Health and Social Welfare took a firm position on the absence of such a framework and emphasized the deplorable consequences of this deficiency with regard to health insurance: "This absence of a complete and appropriate legal framework to govern the labor relations of non-salaried professionals in the health field is nefarious both for the government and the syndicates representing those professionals." "Health Insurance", Report of the Commission of Inquiry on Health and Social Welfare, Vol. 1, the Québec Official Publisher, 1967, p. 144.

In the final analysis, these professionals are in much the same situation as their salaried colleagues or any other salaried workers who must negotiate their remuneration and working conditions with one or more often powerful employers. The terms negotiated by the employer and the union for salaried workers are valid to some extent for the professionals who are engaged by the same employer, not as employees but as consultants in private practice.

The *Office* does not consider a compulsory minimum fee schedule a suitable means of controlling the general availability or the regional distribution of professional services, of ensuring the continued existence of small professional offices, or of protecting professionals whose services are purchased by institutions. Either a minimum fee schedule serves no purpose in achieving these ends or else it involves costs which are out of all proportion to the role it plays.

The effects observed by the *Office* of a minimum fee schedule on the availability of services, while applicable to all the corporations, are particularly relevant to the 17 professions with reserved titles. In fact, if the members of these professional corporations were subject to a minimum fee schedule, they could eventually find themselves in a disadvantageous economic situation since they would be competing with non-members who would be free to charge fees below those given in the schedule. It is significant that the Professional Corporation of Chartered Appraisers, aware of the possibility of competition from non-members, took the precaution of including the following provision in its code of professional ethics adopted prior to the Professional Code:

> 13.13 Public tenders: Except when a request for tender by a public body specifies that the tender must be a member of the Corporation, the appraiser's obligation to submit fees in conformity with the tariffs approved by the Corporation does not apply to a request for tender made by a public body for the preparation of a valuation roll.[119]

In the case of corporations with reserved titles whose members are in competition with non-members, the availability of professional services is more likely to be endangered than promoted by the establishment of a minimum fee schedule. The same is true for the regional distribution of services, the survival of small professional offices, and the availability of the services of professionals with institutions as clients. Nevertheless, during the public hearings, four professional corporations with reserved titles requested the *Office* to set a compulsory minimum fee schedule for their members.[120]

CONCLUSION

The analysis of the effects of a compulsory minimum fee schedule on fees and on the quality and availability of professional services shows, in the opinion of the *Office*, that such a tariff would have a major effect only on the fees themselves. It is clear to the *Office* that the main consequence of such action would be to change the laws of the market in favour of those who provide professional services. In fact, if it is true that with such a tariff there is no competitive fee-cutting by members of a corporation, no bargaining and no question of contesting fees, in the opinion of the *Office*, it is generally the professional rather than the consumer who benefits. The only factor which has favored the consumer is the length of time the government has taken in recent years to approve the tariff re-evaluations suggested by the corporations.[121]

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[119] Regulation of the Corporation of Chartered Appraisers, Statutory Regulations, the Québec Official Publisher, 1972, p. 9-750-23.

[120] The Corporation of Industrial Relations Counsellors, the Corporation of Dieticians, the Corporation of Chartered Appraisers and the Corporation of Nursing Assistants.

In the end, a minimum fee schedule for professionals in private practice turns out to be simply the legal confirmation of a minimum remuneration for the services rendered. Certain reservations are therefore felt, particularly since, for all practical purposes, such a tariff would sanction and even increase a level of remuneration which, in fact, is generally higher than that of most workers.[122]

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[121] See page 33 above.

[122] See page 44 above.

The final effect of a minimum fee schedule would be to confirm and even improve, by regulation, the favourable economic position of professionals in private practice.

In addition, such a tariff gives rise to rights which professionals consider acquired rights and which society would be hard put to oppose. Consequently, in an inflationary period such as we have been experiencing, it is logical, on the basis of strictly mathematical reasoning, to think that a minimum fee schedule for a given profession should be raised regularly.[123] Several of the professional corporations with minimum fee schedules have in fact requested the *Office* to index their tariffs; such a measure would entrench the members almost definitively in a superior position vis-à-vis other workers.

Since there is nothing to prove it would clearly be in the public interest to do so, the *Office* does not consider it advisable to recommend that the government give professionals in private practice such advantageous guarantees. The arguments brought forward by certain professional corporations to prove the effectiveness of a minimum fee schedule in guaranteeing the quality and the availability of services do not seem to have any convincingly reasoned basis and cannot in themselves justify the maintenance and further application of minimum fee schedules.

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[123] The only tariffs which need not be adjusted because of inflation are those, such as the percentage tariff, which provide for remuneration in proportion to value. In such cases, the increase in the value of the goods to which the tariff applies ensures the automatic indexation of professional fees.

The *Office* therefore believes that it would be inadvisable to regulate fees by means of minimum tariffs, no matter what authority adopted them,[124] since such action would probably compromise financial accessibility to professional services[125] without offering the public any guarantee of the quality or availability of these services. As emphasized by the researchers at the *Centre de recherche en développement économique* at the Université de Montréal, giving professional corporations the right to impose minimum fee schedules for services rendered by their members amounts to promoting the economic interests of a relatively favoured class of workers at the expense of the labour force as a whole.[126] The *Office* therefore recommends that the government not only decide against extending the tariff system to other professions, but also that it abolish existing tariffs.

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[124] To pursue the analogy between minimum fee schedules and resale price maintenance, we quote the opinion of the Committee to study Combines Legislation on the advisability of this practice, supra, note 53, p. 71: "The Committee has studied resale price maintenance in the light of the two standards of judgment originally set up, namely, the desirability of a free economy and the need for economic efficiency. This study has led the Committee to the general conclusion that resale price maintenance, on the growing scale now practiced, is not justified by either of these standards. It represents a real and undesirable restriction on competition by private agreement or "law" and its general tendency is to discourage economic efficiency. That is why, in our opinion, the prescription and the enforcement of minimum resale prices must be viewed as manifestations of a restrictive or monopolistic practice which does not promote general welfare."

[125] This is also the opinion of the Consumers' Association of Canada, supra, note 19, p. 71: "Such a schedule helps to increase the professionals' income and consequently reduce access to the services they dispense to the public."

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[126] Supra, note 14, p. 146.

CHAPTER TWO: ESTABLISHING A TARIFF SYSTEM COMPRISING FEE SCHEDULES OTHER THAN A COMPULSORY MINIMUM

In the past, the professional corporations have used the minimum tariff almost exclusively, and this system is still the one they generally request. This fact should not however make us forget that, as the table of tariffs already given shows[127], there are other types of schedules for regulating the fees received by professionals in private practice. The *Office* consequently considers it necessary to examine a second fee-regulating scheme, involving the adoption of a compulsory tariff other than a minimum, or of a recommended tariff.

I. COMPULSORY FEE SCHEDULES OTHER THAN MINIMUMS

Maximum and fixed tariffs and tariff ranges will be studied separately to determine their merits with respect to the protection of the public.

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[127] See Table 2, p. 9.

A. The maximum tariff

The compulsory maximum tariff, as we have seen, prevents professionals from charging more for their services than the schedule allows. The fact that a ceiling is thus established which may not be exceeded may lead to the belief that, in principle, the effect of the maximum tariff is to stabilize or even to reduce fees for professional services, and that in consequence it could serve as a measure to increase financial accessibility to professional services.

To date, however, this type of tariff has been virtually unused by the professional corporations. Of all the existing tariffs, only that of the Bar provides for an obligatory maximum: in the case of certain claims, the lawyer's extrajudicial fees are limited to 30% of the sum obtained for his client.[128] This maximum rate however is only one part of the Bar's tariff, which also provides for minimum and suggested fees.

It remains true today that the maximum tariff does not seem to have won a great deal of popularity with the professional corporations. In reading the briefs submitted by them, the *Office* found that, apart from the Bar, which is in favour of retaining the maximum level already found in its tariff, only the Professional Corporation of Physiotherapists asked the *Office* to draw up maximum rates for certain categories of service performed by its members. Such maximum rates would not however, according to the information which the president of that Corporation brought before the *Office*, be compulsory, and could be exceeded by a physiotherapist if he were able to justify his action, according to certain criteria, before the accounts arbitration committee of the corporation.[129]

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[128] See Appendix 2, section 87 of Regulation of the Bar of Québec, Division 1. The tariff of the Order of Notaries includes certain maximum fees, notably in sections 4(b), 17(3), and 35; they are not, however, truly obligatory, since they may be increased if the notary and his client both agree (section 1). For the text of this tariff, see the same appendix, tariff of fees of notaries.

Some corporations are opposed to the maximum tariff as much on the grounds of the implied absence of a minimum standard as on those of the inherent difficulties in imposing a maximum. The Professional Corporation of Dieticians, for example, believes that a maximum fee schedule, although it "allows professionals to establish a very broad range, also runs the risk of freezing fees at a level lower than the minimum necessary to ensure quality".[130] The *Office* has already expressed its views on the argument that the quality of professional service is linked to a minimum tariff.

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[129] "The rate charged by a physiotherapist could be higher if it were justified by the fact of competence clearly superior to the average or to the usual therapy performed, more intensive treatment, the risk of more serious treatment, or by a period of treatment, the risk of more serious treatment, or by a period of treatment longer than normal, which in the case of physiotherapy is approximately an hour to an hour and a half. Such increase in the proposed maximum rate would in our opinion be submitted for approval or examination to the accounts arbitration committee, whose responsibility it would be to confirm or reject a higher rate than our proposed maximum." Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, Volume 6, p. 1342.

[130] Mémoire sur la tarification professionnelle en pratique privée, December 1973, p. 22.

Most corporations reject the principle of a maximum tariff, asserting that any limitation on the fees the professional may charge hinders the provision of first-class service. According to the main arguments advanced in support of this theory by these corporations, and also by the *Centre de recherche en développement économique* at the Université de Montréal, the introduction of a compulsory maximum tariff would have the following results:

- to lead professionals to diminish the quality of their services, or to take advantage of their ability to create demand in order to make up for the loss of earning power caused by a tariff ceiling by offering a greater number of services;[131]

- to lead professionals to dispense with certain services normally required, or to entrust them to auxiliary personnel;[132]

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[131] Order of Podiatrists of Québec, supra, **note 5**, p. 85 ; *Centre de recherche en développement économique*, Université de Montréal, supra, **note** 14, p. 145, Professional Corporation of Chartered Appraisers, Des honoraires professionnels dans la pratique privée de l'évaluation (Principes de tarification), January 1976, p. 18.

[132] *Centre de recherche en développement économique*, Université de Montréal, idem, p. 144.

- to discourage highly qualified practitioners who consider the tariff ceiling inadequate from practising their profession;[133]

- to stifle the urge and limit the efforts toward specialization, the high training costs of which are well known.[134]

These arguments are related to that raised previously, which connected the maintenance of the quality of professional services to the establishment of a minimum tariff. Nonetheless the *Office* finds them sufficiently different to be worth a certain consideration, despite its confidence, as described above, in the various mechanisms which control the quality of professional activities.

It is probable that the introduction of a maximum tariff which would prevent the members of a corporation from obtaining the fees available on the open market might entail a more serious deterrent risk than the absence of a minimum tariff or the introduction of a minimum tariff of relatively low fees. In the two latter cases, nothing prevents a professional from trying to obtain the going market rate for his services, which is obviously not possible for a professional bound by a maximum tariff with ceilings lower than those of the market.

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[133] Professional Corporation of Chartered Appraisers of Québec, supra, note 131, p. 19.

[134] Idem.

In other words, the absence of a minimum tariff does not prevent a professional group from receiving the level of remuneration it wishes, while the maximum tariff is of course an obstacle if the rates fixed by it are beneath that level. So, despite the fact that in the realm of professional services the relationship between price and quality has been shown to be extremely tenuous, it must be admitted that the existence of a maximum tariff, because it would be more of a deterrent than the absence of a minimum, might have negative effects on the quality of service.

Be that as it may, the *Office*'s main reservations about the maximum tariff do not concern its effects on the quality of service but rather the feasibility of its use as a measure to improve access to professional services. These reservations are based on the Government's marked preference to date for a policy of accessibility whereby it assumes the cost of professional services, and on the existence of a variety of obstacles to a maximum tariff truly favourable to the consumer.

1. The Government's preference for a policy of accessibility whereby it assumes the costs of professional services

Recent experience has shown that up to now, when the Government has wished to ensure greater financial accessibility to professional services, it has not resorted to public regulation, to artificially limit the level of fees earned by those offering such services. Instead it has chosen to assume their cost directly by employing the professionals in publicly funded institutions, or by various social measures, such as health insurance, legal aid, and contributory animal health insurance.[135]

Naturally these three plans provide for the establishment of fee schedules for the professional services they furnish. It is not, however, the level of the tariff thus fixed which ensures accessibility to these services, but rather the fact that the State pays the costs. Within the framework of these plans, the adoption of a tariff, most frequently after negotiation, is not as such intended to limit the remuneration of the professionals whose services are ensured.

These recent measures, taken to ensure financial accessibility to certain professional services, show that in its pursuit of this goal the State has chosen a policy which does not have a detrimental effect on the economic situation of professionals practising privately in these fields. On the contrary, in addition to causing a rise in the demand for the services of those professionals, the accessibility measures enable them to earn a highly satisfactory income, established on the basis of tariffs duly negotiated with their professional associations.[136] Clearly, it is difficult to reconcile such a policy with one based on the imposition of maximum tariffs fixed at levels lower than, or close to, the average market rates , and which consists in making the professionals shoulder a large part of the cost of greater accessibility by reducing the fees they can earn, while at the same time failing to guarantee them an increase in demand for their services.

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[135] See above, pp. 18-20.

In today's context then, the *Office* does not feel it would serve a useful purpose to recommend the implementation of a maximum tariff as a tool to increase financial accessibility to professional services. The Consumers' Association of Canada (Québec) shares this viewpoint. After emphasizing that any fee-setting policy ought to have as one of its objectives greater access to professional services, the Association goes on to clarify its position:

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[136] It is significant that among the professional corporations involved in health care who presented briefs at the public hearings, many whose members offer services not covered under the health insurance plan asked that these services be thenceforth included in the plan. Without in any way denying that the professionals had the public interest in mind when presenting their request, the *Office* notes that this widespread urge to participate in a public social insurance plan shows clearly that such a plan, far from affecting adversely the income of the professionals it includes, is usually favourable to them.

> It would be an error, however, to expect the professionals alone to assume the cost of a social policy aimed at making essential services more accessible . . . The professional must contribute to greater accessibility but must not bear the full burden of this policy on his own. If access to essential services proves to be a social objective of primary importance, then the State must be prepared to assume the cost of part or all of these services, as is the case at present for medical care and legal aid.[137]

2. Difficulties in the drawing up of a maximum tariff favourable to consumers

Evaluating the likely effects of a maximum tariff on fees for professional services leaves the *Office* doubtful that such a tariff would really increase accessibility. Even supposing, in contradiction to what has been stated above, that a maximum tariff could constitute the major means of promoting financial access to professional services, it is not at all certain that the use which would be made of it would allow it to play this role. In today's socioeconomic context, it is doubtful whether the adoption of a maximum tariff would in practice help to reduce fees for professional services, or even help to prevent a rise.

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[137] Supra, note 71, p. 11.

In the opinion of the *Office*, the maximum tariff could be a means to accessibility only if the fees it set were lower than or equal to the average market rates. If it fixed higher than average fees, these would very probably become the only ones charged by most professionals. It would become in effect a highly attractive norm, to which professionals would tend to adhere while pointing to the official character of the standard, suggested by the *Office* and approved by the government, as justification. Far from stabilizing or reducing fees , the maximum tariff would thus at one and the same time be catalyst and excuse for artificial increases. The Consumers' Association of Canada (Québec) furthermore stressed in its brief that the introduction of a relatively high maximum could have an inflationary effect on fees for professional services:

> The danger, however, is that compulsory maximum fees may be fixed high enough to allow free competition at the lower levels in order to profit from the advantages offered by this method. It is not at all sure that what is then considered as the maximum fee will not become the rate normally applied by all the members of a particular profession. Once again, the use of this method can send up the price.[138]

This opinion is also shared by the Québec Bar, the only professional corporation to include a maximum in its fee schedule for a substantial part of its members' services: the extrajudicial tariff, it will be recalled, limits the sum a lawyer may demand from his client in liability actions to 30% of the amount awarded. Although the Bar would like to see this maximum retained because it curbs the practice of charging contingent fees[139], it opposes any extension of the maximum rates in its present tariff on the grounds that "the maximum tariff rapidly becomes the usual tariff, even if the quality of the service leaves something to be desired".[140]

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[138] Idem, p. 20.

The Order of Engineers arrives at a very similar conclusion in examining the advisability of introducing a maximum tariff for its members:

> The maximum tariff fixes a ceiling on what an engineer may earn. Although, on the one hand, such a ceiling appears to have the advantage of protecting the public from excessive charges, in practice the maximum could easily become a minimum.[141]

The effectiveness of an obligatory maximum fee schedule as a financial accessibility measure depends directly on its establishment at a level favourable to the consumer, that is, at a level lower than or very close to the average market rates. Plainly this task presents grave difficulties because of the many socioeconomic factors supporting a high maximum tariff and the strong pressure exerted by professional groups.

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[139] This practice, apparently widespread in certain provinces and in many American states, makes the lawyer's fee completely dependent on the outcome of his case. If he fails to win a favourable verdict he receives nothing; but if he succeeds he takes a very high percentage of the money he has won for his client. On this subject see the Code of Professional Conduct adopted by the Council of the Canadian Bar Association, August 25, 1974, pp. 41-42.

[140] Supra, note 54, p. 13.

[141] Supra, note 45, p. 6.

(a) Socioeconomic factors supporting a high maximum tariff

Since the maximum tariff sets the top fees which the members of a profession may charge for their services, it is obvious that there would be even stronger pressures to fix it at a relatively high level in this case than in the case of a minimum fee schedule. Many reasons could be advanced for setting the ceiling high: the region where a professional works, his practising alone or with a group, the difficulties of his work and the civic responsibilities which it may entail are all factors which might raise the cost of professional services and which must therefore be taken into account when determining maximum fees.

The *Office* is paying particular attention to another factor which tends to increase the maximum rates. Many professionals acquire, in the course of a career which usually lasts more than 35 years, special skill and competence in their disciplines. This might be due to a more thorough training, to long experience, to specialization or, more simply, to a special gift for the work. Each of these elements enables a professional to earn a certain distinction.

This distinction is built on competence and individual effort, those cornerstones of the North American economic system. It is recognized, appreciated, and may be rewarded in the world of the professions as it is in any other sector of our economy. When deciding on a maximum tariff for a given profession the *Office*, and doubtless the government as well, would have difficulty denying that the reputation enjoyed by many of the best practitioners in that field entitled them to a higher income than that of their colleagues. The almost inevitable consequence would be maximum fees well above the average market rates , fees which would sooner or later be demanded by a great many professionals all claiming to be practitioners of distinction.[142]

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[142] To prevent such an outcome, each corporation could set up a committee to evaluate the reputation of its members. The medical professions in France and the United Kingdom have set up evaluation structures within the public health system, and certain difficulties of application have become apparent. See J.-J. Dupeyroux and J. Garagnon, "Le contentieux de la notoriété médicale", *Recueil Dalloz*, Paris, Jurisprudence générale Dalloz, 1962, 19; J. Garagnon, "La notoriété médicale, une notion périmée?", 1966, 7-8 *Droit social*, 443 for the French experience. For the English experience see S. Bourne and P. Bruggen, "Examination of the Distinction Awards System", *British Medical Journal*, Supplement, January 18, 1975, 162; P. Bruggen and S. Bourne, "Further Examination of the Distinction Awards System in England and Wales", *British Medical Journal*, February 28, 1976, 536.

(b) Pressure from professional groups

The problems which the *Office* and the government might encounter in withstanding the different pressures in favour of an extremely high ceiling would undoubtedly be less serious if the interests concerned, those who provide professional services and those who make use of them, could be heard on equal terms before the *Office* on the question of suggesting fee schedules, and before the Lieutenant-Governor in Council on the question of their final approval. But a balance between these two sides seems difficult, even impossible, to achieve at the present time, since there is simply no comparison between the strength of the professionals' lobby and that of consumer groups. The truth of this was amply illustrated at the hearings: of the 32 briefs submitted to the *Office*, 30 came from professional groups, the remaining two from the Consumers' Association of Canada (Québec) and the Conseil du patronat du Québec.

The difficulty which regulatory bodies like the *Office* have in obtaining a satisfactory expression of the views of consumers is not unique to Québec. It has often been noticed and analysed both in the United States and in Canada during recent years. In 1973, the Canadian Consumers' Council came to the following conclusion:

> It appears from studies on most of Canada's regulatory boards and agencies, carried out on behalf of the Canadian Consumers' Council, that if the business interests regulated by these agencies have had the chance to put across their points of view, and have actually done so, it is because they had the financial resources and the requisite skills, and because they had the determination and unity of purpose necessary to support their interests before the control body. In most cases the interests of the consumer were inadequately represented, when they were represented at all.[143]

There is no reason to believe that this bleak analysis would not be fully borne out if the *Office*, and subsequently the government, were to decide to establish an obligatory maximum tariff for a given professional group.[144] It is easy to imagine the difficulties that could be created by the professional lobby while the tariff was being drawn up.

To begin with, since a fee schedule would directly affect the economic status of the professionals by interfering with their earning power, it would be natural for the *Office*'s chief opposition to come not from the professionals themselves but rather from the associations which represent the professionals in private practice, such as the Association of Consulting Engineers of Québec or the Association of Consulting Land-Surveyors of Québec. Tariffs set up in the fields of health insurance, legal aid, and contributory animal health insurance were usually discussed with the associations concerned.

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[143] Report on the Consumer Interest in Regulatory Bodies and Agencies, Ottawa, 1973, p. 17.

[144] Very conscious of the strength wielded by the professional groups, the *Conseil du patronat du Québec* made a point of expressing in its brief its anxieties over the price level that might result from fee-setting, even in the mildest form. This is how the Conseil put it: "The skill of the government negotiator and his ability to stand up to pressure from a homogeneous and well-organized group would be of concern to enterprise if it knew that it was the State rather than the free interaction of supply and demand which was responsible for the establishment of a minimum fee for a given service.": supra note 55, p. 8.

Furthermore, if tariffs were established following negotiations between the government departments and the professional associations concerned, the consultations called for under section 12(u) of the Professional Code would, almost inevitably, rapidly take on the character of true negotiations intended to lead to an agreement. Most of the professional associations which took part in the *Office*'s public hearings did so essentially to insist that, should the *Office* come out in favour of fee schedules, those schedules should not be the result of a unilateral decision, whether accompanied by consultation or not, but of a properly negotiated agreement.

The brief presented jointly by three associations of veterinary surgeons is very clear on this point:

> If, in establishing a negotiated program *entirely* funded from the public purse, the State takes care to respect the right of *association* and the attendant rights of representation and *negotiation*, it would be *unacceptable* for it to treat the private sector differently.[145]

Several professional corporations were of the same opinion. The Order of Dentists, after first announcing its opposition to any "forced imposition of fee-setting" by either the *Office* or the government, goes on to say in its brief:

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[145] *Supra*, note 118, p. 10. The Association of Dental Surgeons, which also recommended negotiation as a mechanism for drawing up fee schedules, based its position on the following arguments: "The *Office de la profession* (sic) and the Lieutenant-Governor in Council cannot by themselves engage in a decision-making process which affects both the public interest and the professional and economic interests of the members of a profession. The professional association has an inalienable right to participate in the decision making, to the extent that the members' interests are at stake." *Mémoire présenté à l'Office des professions du Québec sur la tarification professionnelle*, Montreal, November 1975, p. 6. The Federation of Insurance Brokers of Québec, though its 27 member associations do not include professionals within the meaning of the Professional Code, presented a brief at the *Office*'s public hearings to make exactly the same point: "What is really at stake in these discussions is the question of whether, in the future, professionals whose fees are neither fixed by collective agreement nor determined by law are going to find their remuneration controlled by what amounts to a unilateral government decision no matter what outward form it might take." *Mémoire présenté à l'Office des professions par la Fédération des courtiers d'assurance du Québec*, Montreal, November 1975, p. 11.

> Naturally there is no objection to tariffs being the subject of collective agreements between a third party and a professional union, since the contractual, and consequently free nature of the fee-setting would be protected. In the Order's opinion, it is the professional associations, responsible as they are for the material well-being of their members, which should be in charge of negotiating such agreements, and not the professional orders themselves. In short, whether the drawing up of a professional tariff is done individually or collectively, it should keep its contractual character.[146]

The Consumers' Association of Canada (Québec) is equally in favour of negotiating with the professional associations. It proposes adjustable fixed tariffs, which would be drawn up in the following way:

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[146] Mémoire de l'Ordre des dentistes du Québec sur la tarification professionnelle, November 1975, p. 3. This position is shared by the Professional Corporation of Physicians of Québec, which states in its brief that a tariff of fees is necessary for medical services not covered by the health insurance plan, and for services provided by physicians who do not participate in the plan or who have opted out: "However, to ensure that conciliation and accounts arbitration proceed smoothly, it would seem useful to draw up a tariff of fees for professionals in private practice. This tariff should be negotiated with the federations of physicians." Mémoire de la Corporation professionnelle des médecins du Québec sur la tarification professionnelle, December 1975, p. 5. The Order of Optometrists carries the role of the professional association further by asserting that it is not up to the *Office* at all but to the Professional Association of Optometrists of Québec, after consultation with the *Office*, "to establish a professional fee schedule for optometrists in private practice.": Réglementation des tarifs d'honoraires professionnels dans la pratique privée, November 1975, p. 9.

> In our opinion, the Board should first of all formulate a general policy on fee-setting similar or identical to that proposed in the present brief. Secondly, the professional corporations should be asked to identify the categories of professional acts practised within their particular spheres of activity. A third stage would be the negotiation of fees on the basis of this classification between the Professions Board and the professional associations, or the different representatives of the professionals involved . . .
>
> Finally, the consumers' associations and the professional corporations should be consulted concerning the result of the negotiations before the fee schedules that have been worked out are presented to the Lieutenant Governor in Council.[147]

In this situation, where unilateral fee-setting after consultation and negotiated agreement are opposed, the *Office* would have to choose between establishing tariffs of fees after simply consulting the professional groups concerned, which would run counter to recent custom in the setting of required tariffs for certain of the social insurance plans, and negotiating tariffs with the professional associations in the same way as is done for these plans but without the government's assuming the cost of the professional services covered by the tariffs.

It is hard to see how the *Office* and the government could succeed, whatever their procedure and with the best will in the world, in obtaining a representation of consumers equal to that which the professionals would be able to muster. As has already been emphasized, the disparity between the consumer and the supplier as far as representation of interests is concerned is nowhere more evident than in the realm of professional services. While the interests of the professionals are usually promoted by influential organizations with well defined demands and objectives, the interests of the consumers are inevitably fragmented,[148] and represented by groups who cannot concentrate all their efforts on the problem of professional services but must deal with every aspect of the production of goods and services.

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[147] Supra, note 71, p. 24.

This situation could affect not only the adoption of possible fee schedules but also the overall regulation of professional activities. The *Office* hopes that the study it is carrying out on professional services and consumption will enable it to present concrete suggestions to the government respecting professional services.

The disproportion between the power of economic interests and that of public regulatory agencies is not however unique to the professional sector. Taken as a whole, this problem is obviously well beyond the scope of the *Office*'s mandate. Consequently the

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[148] Canadian Consumer Council, Annual Report for 1971, Ottawa, 1971, pp. 10-11.

Office has no intention of tackling it alone, but rather recommends to the government that it be studied in its entirety so that the necessary corrective measures can be taken.

To sum up, the various socioeconomic factors arguing in favour of a high maximum tariff as well as the pressure professional groups can exert in its support raise many doubts as to the advisability of using the maximum tariff as a means of improving financial accessibility to professional services. Although at first sight it appears likely to benefit the consumer, in practice there is a strong risk of its artificially raising the income level of professionals as a group, as might the compulsory minimum tariff.

Because the maximum tariff does not seem to be a suitable measure for improving access to professional services is not perhaps as damaging as it may at first appear: even if it could be set at a relatively low level, there is no guarantee that over the medium or long term it would truly benefit the consumer.[149]

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[149] Without labouring the point, it is worth mentioning that experiments in the imposition of maximum rates or prices in other sectors of the economy have demonstrated the difficulties that this type of control can create in a given market. It has often been noted that such measures are circumvented by unofficial payments or the creation of a black market, and the effects on availability have usually been disastrous. Rent controls, for example, implemented in various countries since the beginning of the century, have often over the long term had harmful effects on this sector of the economy, made particularly obvious by a shortage of housing. This is at any rate what can be gathered from the study made by the Fraser Institute, Rent Control, A Popular Paradox: Evidence on the Economic Effects of Rent Control, Vancouver, 1975, p. 58: "Price control produces shortages because if the price is kept below the market price the control becomes, in effect, a tax on the supplier. The amount of the tax is the difference between the market price and the control price. The only way the supplier can avoid the tax is by not supplying the commodity or service. Since the proceeds of the tax are, in effect, given to the consumer, the consumer is encouraged to demand more. Thus, since price control taxes suppliers and gives the proceeds to consumers it leads inevitably to a widening gap between the amount demanded and the amount supplied - i.e., a shortage!" On the same subject see also Rapport du groupe de travail sur l'urbanisation, "L'urbanisation au Québec", Québec Official Publisher, 1976, pp. 215-217.

The Consumers' Association of Canada (Québec) saw clearly the dangers of using a compulsory maximum tariff in the professional services. Postulating the establishment of maximum tariffs whose rates would be truly low, the Association concluded:

> If the compulsory schedule is fixed at a fairly low level to compensate for this eventual drawback, there is a risk of discouraging practice in this sphere of activity and consequently of reducing access to the services, not because of the high costs, but this time because of the absence of practitioners in a given sector.[150]

In the same vein, but dealing with the distribution of services, the researchers of the *Centre de recherche en développement économique* at the Université de Montréal pointed out that if the level of the maximum tariff "does not provide sufficient incentive, remote regions with a low population density could suffer from lack of services".[151]

The *Office* does not feel that it would be opportune to recommend that the government adopt the compulsory maximum tariff as a means of ensuring the financial accessibility of services performed by private practitioners. For one thing, such a recommendation would be unrealistic, since to date the Government has preferred to act in this matter by a policy of purchase of services. For another, the introduction of this type of tariff might well lead to results diametrically opposed to those intended. Too high a maximum could limit financial accessibility, while too low a tariff could compromise the regional distribution of services, and, in the long term, their general availability.

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[150] Supra, note 71, p. 20.

[151] Supra, note 14, p. 144.

Given the current situation, the *Office* believes that the best way to make professional services more accessible is to expand the range of services provided in the network of public institutions or, if that is impracticable, to increase the number of services or beneficiaries covered by existing social insurance or social assistance plans.

Nevertheless, with regard to the only compulsory maximum to be found among existing fee schedules, the 30% rate provided for in the lawyers' extrajudicial fee schedule, the *Office* sees no reason at present for abolishing it. As long as the practice of charging contingent fees[152] cannot be effectively prohibited by other means, such as a code of ethics, or as long as it is in the public interest to retain this maximum, the *Office* considers the 30% ceiling to be necessary.

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[152] See above, p.101 and note 139.

In order to discover if there are good reasons for abolishing contingent fees, which, it will be remembered, are charged in certain Canadian provinces and many American states, the *Office* hopes in the near future to undertake a study of this whole question. If it is found that the practice benefits the consumer in a general sense, the 30% maximum might then possibly be eliminated.

B. The fixed tariff

The compulsory fixed tariff establishes the fee a professional may ask for his services. Since this fee cannot vary, it is at one and the same time the minimum and the maximum rate which can be charged. All fee competition among professionals is thereby eliminated, and freedom to negotiate a contract is severely limited. Of all the possible tariffs, this is the one which controls most completely the economic aspect of the client-professional relationship.

Like the maximum tariff, the compulsory fixed tariff has been little used up to now by the professional corporations. Fixed rates are found in only a few of the existing tariffs, and even there they are not employed nearly as much as the minimum rates. The tariff of the Order of Land Surveyors, for example, contains a few fixed charges for certain services performed by its members.

Provision has also been made in the Tariff of the Order of Notaries for some fixed charges but they are not properly speaking compulsory since the notary may raise them with the consent of his client.[153] During the *Office*'s public hearings, these two professional corporations supported the retention of the fixed rates contained in their tariffs. This was the only support received for this type of tariff from any of the professional corporations.

The *Office* has reservations about the compulsory fixed tariff which are similar to those discussed earlier with regard to the minimum and maximum tariffs. These reservations, as in the case of the maximum particularly, are less concerned with the consequences of a fixed tariff on the quality and availability of services[154] than with their financial accessibility. The *Office* considers that a fixed tariff would very probably be set at a level favourable to the professionals, and above the average market rates.

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[153] See Appendix 2, the Tariff of Land Surveyors and Geometers of Québec, in particular sections 4.2.3., 4.3.3., and 4.4.4., and the Tariff of fees of notaries, sections 8 and 9. It should also be mentioned that the judicial fee schedule for lawyers is fixed and compulsory: see above, note 32, and in Appendix 2 the text of the tariff in question.

It would be superfluous to repeat here the arguments used to show how unrealistic it is to expect maximum rates to be set at a relatively low level. In the *Office*'s opinion, however, those arguments are just as valid for a tariff which has all the characteristics of a maximum since it sets the only fee that may be charged for a given service by any of the members of a profession.

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[154] It is, however, interesting to note the opinion of researchers at the *Centre de recherche en développement économique* at the Université de Montréal, supra, note 14, p. 151. They weigh some of the possible effects of a fixed tariff on quality and availability of services in the following terms: "A feature might be mentioned here which could prove important: if tariffs are established for all or for any of the acts performed, and if the relative fees for the acts performed do not coïncide with the relative effort required to perform them, professional practice will undergo a change. This seems to be happening already in the existing health insurance plan. For example, general practitioners are substituting lengthy examinations for the usual checkup, and injections of sclerosing solutions are being given more and more frequently. Any such modifications in professional practice could have undesirable results on both quality and availability, i.e. certain treatment would be difficult or easy to obtain depending on whether or not it interested the practitioner. What is true within one profession could spread to the interprofessional level and, in the long term, affect the availability of practitioners in every profession."

This means that a fixed tariff is as likely as a maximum tariff to push up fees for professional services artificially. The effect might be even more marked, since a fixed tariff is just that and cannot be reduced by the professionals as can a maximum. Accordingly the *Office* is unable to endorse the principle of a compulsory fixed tariff for it is convinced that in practice this type of tariff could only have a detrimental effect on the public's financial access to professional services.[155]

Quite apart from the effects which the fixed tariff might have on the price of professional services, the *Office* does not consider it an appropriate way to control professional fees in private practice.[156] Too many factors influence the manner in which a professional service may be rendered for a fixed value fair both to professionals and clients to be assigned.[157]

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[155] If, for example, the public had to assume full responsibility for the cost of the health services now provided under the health insurance plan, at the fixed tariffs negotiated under those plans, it is practically certain that financial accessibility to these services would be more limited than it was before health insurance was introduced. Of course, as has already been stated, fixed tariffs within such plans were not specifically intended to limit the salary levels of the professionals involved. All the same, it is undeniable that the economic justification for setting those tariffs at one level rather than another should to a large extent be taken into consideration when fixed tariffs are established under section 12(u) of the Professional Code. See above, pp. 105-108.

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[156] The researchers at the *Centre de recherche en développement économique* at the Université de Montréal, supra, note 14, p. 77. have also asserted that the fixed tariff does not appear to be suited to professional services: "Since the professions in general do not extend formal recognition to specialization attained through advanced studies - a mistake in our opinion - it seems to us that there should not, under any circumstances, be a single tariff, so that a specialist may, through his reputation, gain public recognition for an exceptional skill which is not attested to in any way by his professional corporation."

[157] The use of the fixed tariff in such plans as health insurance, legal aid, and contributory animal health insurance is directed toward particular ends which are not dealt with under section 12 (u) of the Professional Code. Since it is the State which operates these plans and pays the professionals according to the tariff, it is obvious that a set tariff is more stable and more effective than a tariff which allows variation of whatever kind in the fee, either from a maximum or from a minimum. Besides this, the disadvantages of a fixed tariff are much less evident in such plans, from the public's standpoint because the government defrays the cost of the services, and from the professional's standpoint because the government is generally bound by law to negotiate an agreement with them about the tariffs which are to be established; see above, pp. 18-20. The use of set rates in judicial fee schedules for lawyers is based on special circumstances. See below, note 169.

Various causes of the rise or fall in fees for professional services have already been mentioned.[158] They can affect all professions, whereas there are others which touch only certain sectors. The Order of Veterinary Surgeons, for example, lists some of the factors which influence its members' fees:

> The time devoted to an operation, the years of experience, the equipment and the cost of medicaments, all are factors which may cause variations in the price asked for an act performed by a surgeon.
>
> It must also be taken into account that the professional veterinarian must carry out his work with animals of different species, and of differing sizes. Then too, it must be stressed that this variety of species and size makes a uniform fee schedule quite out of the question.
>
> The purpose for which the client is keeping the animal (pleasure, food) also enters into the decision on the fee.
>
> Fees vary from region to region within the province, depending on the regional economy.[159]

The Consumers' Association of Canada (Québec) opts in the end, after rejecting the other forms of tariff, for the fixed tariff; but it nonetheless acknowledges the problems inherent in the establishment of such a system:

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[158] See above, pp. 49 and 51.

[159] Mémoire concernant la tarification professionnelle en pratique privée, December 1975, p. 2.

> The adoption of fixed fees which we suggest has numerous advantages if it is made in accordance with the forementioned objectives. Its main disadvantage is to impose too much rigidity when considering a whole range of special situations that can relate to the same professional act. A professional act for which the fee schedule has been fixed according to normal standards can experience special and unexpected complications. Inversely, certain methods used may considerably reduce the time normally spent on a professional act.[160]

To counter this inflexibility the Association proposes an adjustable fixed tariff, that is, one which could be increased or decreased by 20% under the following conditions:

> A practitioner should be able to lower the standard rate when:
>
> (a) the fees proposed would constitute a real financial burden for the client;
>
> (b) certain acts, repeated or performed often, reduce the time factor considerably;
>
> (c) the time factor is less than the time usually attributed to a given act because of variations in the procedure or purposes of the treatment;
>
> (d) the main aim of the acts is of particular advantage to the practitioner.
>
> A practitioner might increase the fixed fees when the problem brought to him presents unusual complications.[161]

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[160] Supra, note 71, pp. 21-22.

[161] Idem, p. 22.

Well aware of the difficulties created by a fixed tariff, the Association provides even for the possibility, under certain circumstances, of a professional increasing his fees beyond the suggested 20% margin:

> Finally, provision should be made for the very exceptional case where the practitioner would be justified in charging more than the discretionary 20% increase over and above the basic rate. The professional, in this case, should ask the permission of the accounts arbitration committee beforehand and inform his client of this request. This should be an extremely exceptional situation provided to offset all circumstances and complications that may arise.[162]

The *Office* cannot endorse this scheme of adjustable fixed tariffs, because it appears to combine all the disadvantages of a minimum tariff with those of a maximum. The *Office* has already clearly expressed its disapproval of any regulation which imposes a minimum level on professional fees: as far as the protection of the public is concerned, there is no reason to limit a possible reduction of fees to 20% or any other percentage for a certain client or the clientele in general.

Furthermore, the *Office* considers that the possibility of a 20% increase over and above the fixed rate carries the same risks of an inflationary effect on fees as does any standard which imposes a maximum rate, all the more since the choice of cases where the increase could be imposed is left in large part to the professional, who is the only one really capable of identifying the "unusual complications" which permit the increase.

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[162] Idem, p. 20. The only corporation which requested a compulsory maximum, the physiotherapists, also took good care to provide for exceptional cases for which the maximum could be exceeded; see above, note 129.

The *Office* thus does not recommend to the government the compulsory fixed tariff as a means of regulating professional fees in private practice. In addition to being too inflexible a regulatory instrument for this sector of the economy, it might endanger financial accessibility to professional services as much as and perhaps even more than the maximum or the minimum tariff. Nor does the adjustment formula proposed by the Consumers' Association of Canada (Québec) convince the *Office* that the fixed tariff could truly serve the public interest.

C. The tariff range

The compulsory tariff range sets two rates, a minimum and a maximum, with the professional left free to choose a fee anywhere between the two extremes. At the moment only the Order of Notaries' tariff provides for an upper and a lower limit for certain services offered by its members[163]; but once again this scale is not really obligatory, since the notary and his client may agree to exceed the maximum.

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[163] See Appendix 2, the Tariff of Fees of Notaries, sections 24, 43, and 44.

During the public hearings, the Order of Notaries proposed the replacement of their tariff range with a minimum tariff. This left only the physiotherapists, of all the corporations heard from, requesting that the *Office* establish a tariff range for them; this request however only covered group physiotherapy, a small part[164] of physiotherapeutic services.

The tariff range has few original features worth discussing since it is the result of combining a maximum tariff with a minimum. The arguments already invoked against those two tariffs apply equally to the tariff range. Simply adding an upper limit to a minimum tariff or a lower limit to a maximum does not, as far as the *Office* is concerned, create a third type of tariff, clearly distinct from the other two, which would eliminate their harmful effects on fees for professional services.

The tariff range corresponds almost exactly to the adjustable fixed tariff proposed by the Consumers' Association of Canada (Québec). The double objection to this type of tariff is just as valid against the tariff range[165]: not only does it impose a minimum that could only maintain or increase fees for professional services, which the *Office* feels cannot, in the public interest, be justified, the tariff range also establishes a maximum which might equally bring about a rise in the cost of professional services.

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[164] The Professional Corporation of Physiotherapists also requested a maximum fee schedule for certain services offered by its members; see above, p. 102.

It seems to have been partly the inflationary effect of the tariff range which led the Order of Notaries to request the removal of the maximum rates provided for under their schedule of fees, which now contains a tariff range. The corporation explains in its brief that it would prefer to give up the tariff range, "which sometimes encourages the practitioner to demand from his client the maximum allowed him under the tariff".[166]

There is no reason to labour the point; however, the *Office* considers the tariff range no more likely to protect the interests of the consumer than any of the other compulsory tariffs previously analysed. It does not recommend it to the government as a means of regulating the fees charged by professionals in private practice.

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[165] See above, pp. 131-132.

[166] Supra, note 67, p. 18. The Professional Corporation of Chartered Appraisers, supra, p. 19, note 131, expresses the same fears when it asserts that the tariff range brings about "in time, a general evolution of the minimum prices toward the maximum; the maximum prices become the rule, and finally, the minimum."

The fact that the three compulsory tariffs studied in the preceding pages all include a maximum level could at first glance give the impression that each in its own way could help to lower or keep down professional fees, and consequently to ensure the financial accessibility to professional services. But a more thorough examination has convinced the *Office* that the introduction of such tariffs would, on the contrary, tend to send up the rates for professional services.

The Order of Dentists of Québec is as apprehensive as the *Office* about compulsory tariffs, whether maximum or minimum:

> Faithful to its mission of public service, the Order of Dentists of Québec is alarmed by the possible consequences for the public of a compulsory tariff of fees. It submits that a compulsory tariff would chiefly benefit the material well-being of the professionals.
>
> . . . The American experience shows that the material interests of the professionals are generally of primary consideration in the drawing up and the revision of compulsory fee schedules. These schedules are often the product of enquiries into economic matters, and are in such cases envisaged as a means of eliminating competition and increasing the revenues of the professionals concerned.[167]

The reservations felt by the *Office* about compulsory tariffs containing a maximum stem equally from the work entailed in keeping them up to date. Since they set the highest rate which can be charged for a given service, these tariffs could in a period of inflation rapidly become unsuitable and should logically be revised at regular intervals. There is every likelihood that revision would take the form of indexation to the cost of living, this method being straightforward, objective, and widely used. This at least is what the Consumers' Association of Canada (Québec) proposes:

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[167] Mémoire de l'ordre des dentistes du Québec sur la tarification professionnelle, supra, note 146, pp. 4-5.

> We also suggest that fees be adjusted once a year to the increase in the cost of living. An indexation mechanism for professional fees should therefore be planned so that these may continue to be realistic in relation to their original bases.[168]

Indexed in this manner, a schedule including a maximum would guarantee to the professionals a precise rung on the economic ladder, a status difficult to re-examine once it has been treated as a right.

The difficulties arising from the revision of compulsory tariffs containing a maximum constitute for the *Office* a further reason for not suggesting to the government the use of such tariffs within the framework of section 12 (u) of the Professional Code. As in the case of a minimum fee schedule, the *Office* believes that such economic guarantees, which would shelter professionals from fluctuations in the rates for their services, are not sufficiently in the public interest for it to recommend them to the government.

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[168] Supra, note 71, p. 21.

At present the *Office* can see only one exceptional circumstance in which a maximum tariff might protect the public: when the person who must pay the fees has not been at liberty to choose the professional who provides the service.[169]

The only profession in the which the *Office* feels such circumstances are likely to arise regularly is that of the notary. In certain cases one party has the choice of notary but the other is obliged to pay his fees; this seems to happen often with loans on mortgages, where the borrower, while responsible under the terms of the contract executed by a notary for the expenses of that contract, is nonetheless usually obliged to use the services of the lender's notary. This is the result of section 26 of the Notarial Act, which provides protection for the contracting party whose rights stand in most need of it by determining who is to choose the notary if no agreement can be reached by the parties in the case.

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[169] This situation might result from a legislative provision or from a clause in a contract stipulating that the party who is obliged to pay the professional without being able to select him may not in practice refuse without forfeiting the benefits of the contract.

A somewhat similar situation exists in the legal profession, where the losing party must pay the fees of the winning party's lawyer although he has had no control over the choice of professional. A tariff regulates the fees to be paid in such cases, which both prevents possible abuses by the successful lawyer and allows a person going to law to know in advance what the costs may be. On the subject of the Bar's judicial fee schedule, see above, note 32, and Appendix 2, the text of the tariff of fees.

In this situation, unique to notarial practice, a maximum tariff may very well appear to be a way of preventing excessive charges from a notary chosen by one party but paid by another. The *Office*, however, wonders if a better method of preventing abuse would not be to draft new rules which, while respecting the role of the notary as an impartial public servant as well as the rules governing the choice of notary as set forth in section 26, would for example require the party who under that section had the right to choose the notary to pay his fee.

The *Office* hopes in the near future to start discussions on this point with the Order of Notaries, to determine which formula is the most likely to protect the interests of all parties to a notarized deed.

II. RECOMMENDED FEE SCHEDULES

Even when adopted by regulation and approved by the government, a recommended fee schedule is no more than a guide, a standard to which the professional can refer when setting his fees. Like the compulsory tariffs, suggested or recommended tariffs can be minimum, maximum, range, or fixed. In the last case a suggested tariff would merely give the average or customary rate charged for the service in question.

Of the nine fee schedules governing professionals in private practice in Québec, only the architects' is in general of the recommended type. As we have seen[170], this tariff establishes rates which can serve in a court of law as proof of the value of the architect's work, unless he and his client have agreed in writing upon other rates. Containing as it does a fair number of fixed rates and certain minimum rates, it is more than a simple suggested tariff: if there should be litigation between architect and client, only their written agreement enables the court to override the terms of the tariff. This is no doubt why the Order of Architects generally prefers to call it an "official" tariff. The extrajudicial fee schedule for lawyers also includes recommended rates, for expropriation cases; see section 89 of the Regulation of the Bar of Québec, Division I, included in Appendix 2.

During the *Office*'s public hearings, four of the 17 professional corporations who requested regulatory tariffs were clearly in favour of a recommended tariff.[171] According to these corporations, the rates in such a schedule should indicate the average or usual fees charged by their members.

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[170] See above, notes 7 and 43.

[171] These four were the corporations of chiropractors, guidance counsellors, occupational therapists and nurses.

Furthermore, of the 13 other corporations, who almost all requested an obligatory minimum tariff,[172] two expressed the desire that some of the minimum fees applicable to their members should be recommended ones only. One of these corporations was the Order of Agrologists, which said:

> Tariff controls should be obligatory at least for small clients and small professional offices. They could be recommended only in cases where no protection seems to be necessary, although in such cases questions involving fees could still be open to inspection.[173]

The other was the Order of Architects which, classifying the services offered by its members, requested a compulsory minimum tariff "in the case of public buildings or buildings whose cost exceeds $100,000", and an "official" recommended minimum tariff for other services.[174]

For the corporations which advocate it, the recommended tariff seems to combine the advantages of a compulsory fee structure with those of competitive pricing. In the eyes of the Professional Corporation of Guidance Counsellors, for example, the most satisfactory innovation in the field of professional fees would "lie in the establishment of a recommended tariff, which retains the advantages of both preceding systems while avoiding their drawbacks".[175]

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[172] See above, notes 48 and 49.

[173] Supra, note 95, p. 6.

[174] Supra, note 46, pp. 25, 38, 49-51. See also the Notes sténographiques des consultations publique de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, Volume 5, p. 1033.

But for the professional corporations which favour a compulsory tariff, particularly a compulsory minimum, the recommended tariff appears to have a variety of drawbacks. For example, the Professional Corporation of Chartered Appraisers claims that "the recommended tariff, in whatever form, as a substitute for a free market economy unites the disadvantages of a laisser faire and of a planned economy, without the advantages of either".[176]

Such diametrically opposed viewpoints as to the eventual effects of a recommended tariff on the market for professionals services shows how difficult it is to weigh objectively its worth as an instrument for regulating those services and encourages instead consideration of its value as a means of informing the public.

A. The recommended tariff as an instrument for regulating professional services

Having rejected the compulsory tariff as a means of effectively regulating fees or improving the quality and availability of services, the *Office* does not see how it could come to a different conclusion with regard to the recommended tariff, whose use would be voluntary.

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[175] La tarification des honoraires professionnels en service privé, brief presented by the Professional Corporation of Guidance Counsellors of Québec to the *Office des professions du Québec*, December 1975, p. 5.

[176] Supra, note 131, p. 17.

As far as quality and availability are concerned, the situation seems perfectly clear. Since no significant link could be found connecting maintenance of quality and availability of service with a compulsory tariff, it is even less likely that one will be found with a simple recommended tariff. The *Office* is thus in agreement with the *Centre de recherche en développement économique* of the Université de Montréal, which states that recommended tariffs "have no particular foreseeable effect on quality and availability".[177]

The question is slightly different, however, when fees for professional services are under consideration. It is obvious that a compulsory tariff can control these fees, but the same cannot be said of a recommended tariff. Even though reducing fees or limiting increases appears to be necessary in certain professional sectors, it is hard to see how the introduction of a tariff suggesting fees lower than the going market rate would help. It is reasonably certain that such a guide would be to all intents and purposes ignored by professionals, since it would be aimed at a market already favourable to them and one which enables them to set their fees at a very high level.

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[177] Supra, note 14, p. 152.

Plainly the professionals, a unified, well informed, and highly organized group, would have no difficulty in rejecting, on the grounds of its inapplicability, any recommended standard too low to be in their common interests. Nor would the isolated efforts of consumers, however well aware they might be of the recommended tariff[178], succeed in imposing it on the professionals. Set below the market rates, the recommended tariff would barely affect fees and would risk misleading consumers about those they might be expected to pay for professional services.

Furthermore, supposing that an increase in fees were to be seen as the only way to assist professionals in a given sector, it would probably be of very little use merely to suggest fees higher than the market rates: their weakness vis-à-vis the market might not allow the professionals to charge the recommended fees , and only a compulsory tariff could ensure the necessary increase.

The recommended tariff, then, is not considered by the *Office* to be a satisfactory instrument for regulating either the fee for or the quality and availability of professional services. It is not impossible, however, that, differing as it does from the compulsory tariff in an aspect as vital as the obligation to apply it, it may have its own unique role, not in controlling those who provide the services but in informing those who use them.

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[178] See below, pp. 145-158.

B. The recommended tariff as a means of informing the public

Some corporations have asserted that the recommended tariff could play a useful role in informing the public of the fees it could expect to pay,[179] as well as in the conciliation and accounts arbitration procedures provided for under the Professional Code. These two arguments are above all used as supplementary support for compulsory fee schedules: most of the professional corporations in favour of an imposed tariff advocate, as we have seen, compulsory tariffs, and it is from that standpoint that they present arguments for fee-setting in general. The *Office* considers, however, that these arguments can best be examined in the context of a study of recommended tariffs, since they seem to be the one and only justification for such tariffs.

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[179] The idea is also put forward, on occasion, that a recommended tariff, and similarly a compulsory one could be informative for the professionals themselves, especially for those entering the market, by indicating the level at which they should set their fees.

The *Office* would like to dispose of this argument at once. If future members of the professional corporations have not, during their training, managed to acquire the necessary minimum of information on what to charge, a more sensible way to fill this gap than the establishment of regulatory fee schedules would seem to be advice from colleagues or management consultants.

1. The recommended tariff as a source of information to the consumer on fees for professional services

In the *Office*'s view it is absolutely essential to provide the public with full information on the fees for the professional services they may require. It is one of the most effective means of righting the widespread imbalance of strength in the relation between the professional and his client, especially when the latter is a private individual.

This question will be dealt with thoroughly in Chapter Three of this report. For the moment, the *Office* intends only to show that the recommended tariff is not the correct tool for spreading information on fees , first, because it is inadequate, and second, because there is a risk of its benefiting the professional more than the consumer.

(a) An inadequate means of information

According to some corporations, an imposed tariff is an exceptionally good source of information for the public. As the Order of Architects puts it:

> Tariff regulation seems to us the ideal way to disseminate the information necessary for the restoration of a basic tenet of a free competitive economy. Once this level of information has been restored, we can hope that bargaining will again become possible.[180]

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[180] Supra, note 46, p. 37.

At first glance, imposed fee schedules plainly constitute a source of information for the public about market rates. But a second, more searching look shows this impression to be largely illusory, given the way these schedules are published and the type of information they contain.

First it must be recognized that publication of fee schedules is inevitably on a very limited scale. The appearance of the text of a tariff in the Québec Official Gazette, as required by law, obviously does not make it accessible to the general public. Failing all else, the *Office* could see that these texts were reproduced in more widely available publications; however, the type of information they contain is not conducive to this.

On the one hand, the fact that these schedules contain certain fees based on a calculation unit other than the simple hourly or daily rate, which does not suit all professional services, makes them complicated and difficult to consult. Very often the nomenclature makes it confusing for a layman to find the service he needs.[181] A quick look at current fee schedules will bear out this point.[182]

On the other hand, if, to enable the client to have an idea of the possible cost to him of the services, the tariffs contained information of a non-specialized nature, the *Office* does not believe they could supply him with all the facts necessary for concluding the most advantageous agreement possible.

To begin with, the client has no way of discovering the professional who offers his services at the price the client is prepared to pay. Unable to learn in advance what fees are charged by a given professional, he must meet him to find out what his rates are, and only then can he compare them with those in the suggested tariff.

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[181] In its brief, supra, note 67, p. 17, the Order of Notaries states: "The tariff approved by the Order of Notaries enables the public to have a better idea of the kind of services offered by notaries and of the fee for those services."
Although in agreement with the principle of informing the public, the *Office* does not believe that the description of professional services contained in a fee schedule, whether compulsory or recommended, can provide information sufficiently detailed and straightforward to let the public know what is available and consequently to choose wisely.
On the question of consumer education with respect to professional services, this report has formulated only general recommendations; see below, pp. 244-245. This question will be examined in greater depth in the study on professional services and the consumer which the *Office* began several months ago.

[182] See Appendix 2 for the texts of these tariffs.

Even then the client is in a weak position. Since he does not know the fees charged by other available professionals, he cannot judge if there is a gap between their rates and those of the professional he has consulted, or if the gap is an acceptable one. The client's only source of information for these comparisons is the practitioner he has consulted, and on this point a practitioner would have trouble being completely impartial.

This lack could be especially serious in regions where fees usually have to be above or below those of the recommended tariff. For example, in high-demand regions where most fees are probably higher than the average market rates , the recommended tariff could confuse the public in its estimation not only of the overall cost of a service but also of the fee level of one professional in particular. Conversely, where there is a surplus of supply and fees tend to be low, the tariff might also be detrimental to the consumer by allowing the professional to demand rates higher than those of the market.

The *Office* does not maintain that the fee ought to be the only criterion in the choice of a professional, or the only point to discuss with him when concluding an agreement for his services. But in this case as in that of other services, cost is an important element for the consumer in making a decision, and the *Office* consider that the public has the right to the fullest possible information on the subject.

The *Office* does not feel, however, that the recommended tariff can constitute the basis of this information, not only because effective dissemination is difficult to ensure and because the information it provides is much too vague, which makes it impossible for the consumer to compare in advance the various fees asked, but above all because the establishment and official publication of such a tariff in all probability would benefit the professional more than the consumer.

(b) A medium of information which could benefit the professional more than the consumer

Although it is improbable that a recommended tariff could adequately control the fees for professional services in the face of market pressures[183], this does not mean that the introduction of such a tariff would have no effect at all on professional fees.

Even when it is not compulsory, a tariff drawn up by an agency such as the *Office*, approved by the Lieutenant-Governor in Council, and published in the Québec Official Gazette has been officially sanctioned and carries weight. In recommending a tariff, the State lends official support to the professionals who wish to use it. There is reason to fear that professionals who usually charge fees lower than those in the tariff might attempt to raise their rates by constant reference to the official standard in their negotiations with clients.

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[183] See above, pp. 141-144.

On this point it is interesting to note what Professor Richard J. Arnould discovered in a study he carried out on recommended minimum fee schedules and their use by lawyers in the United States: lawyers whose income level is generally quite low are the ones who most often use the recommended schedules as a criterion for setting their fees:

> The relationship between income and the use of fee schedules summarized in Table II lends further support to the hypothesis that those using fee schedules tend to be at the lower income levels and are thus the most vulnerable to competition
> . . .

> Interestingly enough, those using fee schedules as a second or third criterion have incomes that are, on the average, higher than those using fee schedules as a primary criterion. This supports the position that fee schedules are used by the most competitively vulnerable, the inefficient, and in some cases the incompetent lawyer.[184]

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[184] "Pricing Professional Services: A Case Study of the Legal Service Industry", 1972, 38 Southern Economic Journal, 495, pp. 504-505; Table II to which the author refers reads as follows:

"TABLE II

Lawyers' Average Income by Use of Fee Schedule

Use of Fee Schedule	Average Income
Never use schedule	$40,383*
Sometimes use schedule but may charge less	33,849
Sometimes use schedule but may charge more	36,666
Always use schedule but may charge less	27,410
Always use schedule but may charge more	31,267

* This figure is probably biased upward because a number of the lawyers in this category were from California where per capita income tends to be high and which has no state fee schedule."

In an article written jointly with Professor Robert N. Corley and based on the same study, the author observes that lawyers, following the same line of reasoning, use the recommended fee schedule most often when the corresponding fee for a professional act is among the highest in the schedule:

> Table 4 illustrates that fee schedules are not always used by a majority of attorneys except in probate matters. We suggest that the reason for use in excess of 50 per cent in probate matters is that probate fees are frequently too high and cannot be justified on any other basis. Fee schedules are used more when they will justify a fee than when a satisfactory fee can be obtained without that justification.[185]

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[185] Supra, note 81, p. 660. Table 4 to which the authors refer reads as follows:

"TABLE 4

		Always %	Sometimes %	Never %	Not App. & No Ans. %
1.	Basic hourly rate	22.7	45.3	18.4	13.6
2.	Corporation matters	31.7	34.9	12.9	20.5
3.	Collections	23.8	26.4	16.1	33.7
4.	Trial work	22.9	37.6	17.3	22.2
5.	Contingent matters	34.1	24.9	17.3	23.7
6.	Divorce	31.3	31.7	12.8	24.2
7.	Criminal matters	12.4	23.7	18.4	45.5
8.	Probate	51.2	19.9	9.3	19.6
9.	Real estate	31.1	36.3	12.0	20.6
10.	Administrative matters	18.4	31.1	14.2	36.3
11.	Adoptions	36.1	27.0	10.1	26.8
12.	Bankruptcy	28.6	20.1	10.4	40.9"

These observations tend to confirm the fear that some professionals might use the recommended tariff to raise their fees. This partial modification of the fee structure brings other risks in its wake. In effect, the first increase might lead professionals, whose fees are already equal to or higher than those suggested in the tariff, to raise their own fees in order to preserve the distinction between themselves and those professionals who first took advantage of the tariff. This is the conclusion arrived at by Richard J. Arnould in his study:

> If the fee schedule becomes the basis for minimum charges of the inefficient and less competent lawyers, and if these rates are above the competitive level, then the differential or quasi rent that can be charged by the more competent lawyer is even further elevated above the competitive level. Thus, the entire rate structure becomes artificially enhanced.[186]

So the fee structure as a whole could be pushed upward by the imposition of a recommended tariff. Once such a tariff was introduced, an ever-shrinking number of professionals would be willing to set fees below its norms, which would in consequence tend to establish a new and artificially inflated fee structure. The recommended tariff would then have the appearance of a potential compulsory minimum.

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[186] Supra, note 84, p. 505.

It should be noted here that experience has shown, in foreign jurisdictions where professional corporations or associations have set recommended tariffs, that it is rare for professionals to deviate from them by accepting lower fees than those indicated. It would presumably be even rarer if the tariffs had government approval. In the United Kingdom, the Monopolies Commission observed recently that tariffs recommended by professional groups had a tendency, thanks to pressure from these very groups, to be followed as if they were compulsory:

> There appears to us to be little difference between so-called mandatory and recommended scales in their practical effects. Much depends on the extent to which the individual practitioner chooses to - or feels free to - abide by or depart from the scales, and this in turn may depend upon the likelihood of disciplinary action being taken against him. On the one hand, although disciplinary action clearly could not be taken specifically for breach of a recommended scale, the fact that the fees charged were not in accordance with the scale might in some circumstances be quoted in support of a charge of breach of some other rule (*eg* against price cutting or unfair attraction of business). Conformity in such matters may be such that the established practitioner would not depart any more readily from a "recommended" scale than from a mandatory scale.[187]

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[187] *Supra*, note 87, pp. 22-23. It seems, however, according to this same investigative body, *idem,* p. 24, that professionals do not generally deviate upwards from the suggested tariff: "The fees laid down, however calculated, are normally regarded as representing the minimum to be charged. Variations upwards may occasionally be made on grounds of the special complexity of the work or the skill and reputation of the practitioner, but generally speaking, minimum charges tend to be regarded also as maxima."

Even though in this country a professional may charge less than the recommended rate without, in the eyes of the law, being guilty of unethical conduct, the practice is frowned on by the fellow members of his group; it may even be considered an act of unfair competition, punishable by disciplinary action. This determination on the part of professional groups to impose the recommended tariffs they adopt has also been noted in the United States, at any rate with respect to minimum tariffs recommended by the various American Bars for the services of lawyers.

Although the American Bar Association has for many years been opposed to obligatory minimums,[188] with the result that tariffs drawn up by the American Bars are described as recommended, it has long been recognized that, according to the principles of that association, "the habitual charging of fees less than those established in suggested or recommended minimum fee schedules, or the charging of such fees without proper justification, may be evidence of unethical conduct".[189] It was not until 1970 that the Association clearly modified its position to state "that mere failure to follow a minimum fee schedule, even when habitual, cannot, standing alone and absent (sic) evidence of misconduct, afford a basis for disciplinary action".[190]

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[188] See above, note 54.

[189] Formal Opinion 302 of the Committee on Professional Ethics, quoted in "American Bar Association and Justice Department Explain Positions on Minimum Fee Schedules to Senate Subcommittee", supra, note 54, p. 1297.

Despite this unequivocal readjustment, recommended fee schedules may still apparently be used on occasion to justify disciplinary action. As Richard J. Arnould and Robert N. Corley explain:

> It is apparent that while adjectives such as "recommended" are used to describe fee schedules, many of the persons who vote to enact them consider them to be binding, and some members of the Bar treat them as binding notwithstanding the qualifying language and the disclaimer of Canon 12 and the opinions of the American Bar Association Committee.[191]

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[190] Formal Opinion 323 of the Committee on Ethics and Professional Responsibility, idem, p. 1298. On the American Bar Association's change of position, see Robert L. Simmons and Gary N. Holthus, supra, note 70.

[191] Supra, p. 656, note 81. The American Attorney General said regarding the influence of minimum fee schedules recommended by the American Bars: "These fee schedules are often more than mere suggestions. They are at times accompanied by a threat of disciplinary action for those who systematically choose to undercut the suggested fees. Members of the bar who prefer to charge fees lower than those suggested may be threatened with loss of the right to practice law because, in competing on fees, they have engaged in so-called 'unethical conduct and solicitation'." See American Bar Association and Justice Department Explain Positions on Minimum Fee Schedules to Senate Subcommittee, supra, p. 1300, note 54.
In 1975 the American Supreme Court's decision in the case of Goldfarb v Virginia State Bar, 1975, 95 S. Ct. 2004, was that a fee schedule recommended by a county association of lawyers and made virtually compulsory by directives on ethics issued by the State Bar of Virginia was contrary to one of the country's principal anti-trust laws, the Sherman Act. See André Tremblay, supra, note 41.

In Canada, Professor John Crispo, in his study on compulsory and recommended tariffs, described the way in which they are respected by professionals:

> Generally speaking, it would appear that minimum fee schedules have more moral than legal force. This is clearly the case where the power of a group is somewhat nebulous, but it seems to apply even where there appears to be fairly precise authority in this respect. Indeed, even where such schedules are government-approved, there seems to be reluctance to secure compliance through procedures that are bound to attract public attention. Most groups apparently secure greater compliance through moral suasion and emphasis on professional ethics and obligations than through potential penalties. . . .
>
> Seemingly, some combination of their own self-interest and the above considerations leads most of them to respect their groups' minimum tariffs. At least this is the view of the majority interviewed for this study.[192]

To sum up, recommended regulatory tariffs, intended to act as a means of informing the public about fees for professional services, have the paradoxical effect of endowing the professionals with an official bargaining instrument which allows them to raise their fees . Because many professionals have a vested interest in referring to the tariff when setting their fees, even a recommended tariff can, for the consumer, have unfavourable effects closely related to those of the compulsory minimum.

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[192] *Supra*, note 51, p. 21.

Consequently the *Office* is opposed to the establishment of recommended regulatory tariffs. It intends instead, as Chapter Three will explain, to encourage the publication of information which will give the public a clearer idea of the professional services market. This information will have to be detailed enough about the various going market rates to be of use to the consumer without pushing upwards what it is meant merely to reflect.

2. The recommended tariff as a source of information during accounts conciliation and arbitration proceedings

Section 86 of the Professional Code requires the Bureau of each corporation to "establish, by regulation, a conciliation and arbitration procedure for the accounts of the members of the corporation which may be used by persons having recourse to the services of the members". These regulations, which are virtually the same for all the professional corporations, stipulate that an unsatisfied client must first request conciliation of the account by the corporation's syndic. If the syndic does not manage to bring the professional and his client to an agreement, the client may require that the account be submitted for arbitration to a council convened for that purpose, whose decision is binding on both parties.

Some of the professional corporations believe that a regulatory tariff is necessary if this procedure is to function smoothly. The Order of Land Surveyors emphasizes this in its brief:

> Why has the legislature created . . . conciliation and arbitration councils? If there is no tariff, there is no reason for a council. No norm, no standard of reference can be used without a tariff when there is a difference of opinion between the professional and his client. No complaint can be evaluated in the absence of a tariff.[193]

The *Office* does not agree with this point of view: what is the point of conciliation and arbitration if the tariff by itself validates the charge for the service rendered? The *Office* believes that decisions on questions of arbitration ought rather to be based on a detailed study of each account submitted. Such a study could be centred primarily on the criteria which each corporation's code of ethics gives to guide the professional in establishing his fees. These criteria tend to fall into the following categories:

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[193] Supra, note 44, p. 16. The Order's stand is no doubt based on Section 1.5 of its present tariff which reads as follows: "Contestation: A Québec land surveyor in disagreement with his client over the amount of his fees, before taking any legal proceedings, either as plaintiff or defendant, submits the account to a Commission of Arbitration appointed annually by the Board of the Corporation. This Commission applies the tariff in all fairness, without prejudice to the rights of the parties."

> The professional must ask and accept just and reasonable fees.
>
> Fees are just and reasonable if they are justified by the circumstances and commensurate with the services rendered. The professional should in particular take into account the following factors when setting his fees:
>
> (a) the time given to the carrying out of the professional service;
>
> (b) the difficulty and importance of the service;
>
> (c) the performance of services which are uncustomary or which require a skill or a rapidity which are out of the ordinary.

Of course, the rates usually charged by the members of a corporation can be used as a supplementary criterion by the arbitration council, and it is true that in that case a tariff could be useful. It is, however, by no means necessary, and can be replaced by the knowledge which the professionals sitting on the council either have or can obtain of the existing market rates.

A fee schedule is not necessary to accounts arbitration; this is borne out by the fact that many professional corporations without a regulatory tariff have managed to make their arbitration procedures work. It is worth noting here that the Bar, which has experienced arbitration with and without the help of a tariff because its tariff of extrajudicial fees does not cover all of the services performed by its members, does not believe that a tariff is at all necessary in this area. This was asserted by its president during the *Office*'s public hearings when he was asked if a tariff was essential to accounts arbitration:

> On the contrary, we feel that the judges have other things to do than adding two figures together and checking to see if such-and-such an act was performed. They have other factors to take into account, the ones mentioned in our code of ethics, that is what they consider; and also, up to a certain point, the client's ability to pay, even though that is not written down anywhere, I think that with some poor chap who has used a lawyer's services, you have to keep in mind what he can afford.[194]

In the opinion of the *Office*, then, the corporations do not need recommended fee schedules to bring about equitable solutions in litigation resulting from disputes over professional fees.

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In conclusion, the *Office* does not recommend to the government the establishment of recommended regulatory tariffs in the professional services sector. It goes so far as to suggest the withdrawal of the Order of Architects' recommended tariff, and the repeal of the Bar's tariff of extrajudicial fees, which suggests rates for expropriation cases.[195]

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[194] Notes sténographiques des consultations publiques de l'*Office des professions du Québec* sur la réglementation des honoraires professionnels en pratique privée, volume 5, p. 988. The Bar goes even further in its brief, supra, note 54, p. 5: "It is logical to wonder if this power (of arbitration) vested in the Council, which was intended to protect the public, would not become illusory or futile if a tariff of extrajudicial fees were set."

The *Office* cannot recommend the use of the suggested tariff as a means of regulating professional services because its effects in this area are much too unpredictable. Nor can it look on this tariff as a source of information which would help the consumer orient himself in the professional services market and obtain those services under the best possible conditions. Quite the contrary, the *Office* feels that the result of a recommended tariff would be an increase in professional bargaining power.

These conclusions on the advisability of recommended regulatory tariffs are equally applicable to the fee guides set up by a few of the professional corporations.[196] Since one of the basic reasons for the existence of the corporations is to protect the public, the *Office* does not feel they should put into circulation fee guides which closely ressemble recommended tariffs and which ultimately must benefit the professional more than the public. As far as fees are concerned, the role of the professional corporations should be limited to including in their codes of ethics general principles to which members and consumers could both refer[197], and to working out a procedure which would enable an accounts arbitration committee to apply these general principles to specific cases.

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[195] See above, p. 138-139.

[196] See above, note 9.

[197] See above, p. 161.

Fee guides recommended by professional corporations to their members are of course drawn up outside a strict legislative or regulatory framework; consequently they do not have the advantage of the same official sanction as a recommended regulatory tariff. Nonetheless, because they emanate from an organization like a professional corporation whose principal aim is public service, they seem sufficiently authoritative to the consumer for professionals to be able to refer to them whenever this is advantageous. The *Office* therefore recommends that a provision be inserted in the Professional Code forbidding the corporations to draw up and distribute fee guides.[198]

Guides drawn up by such union groups as the professional associations[199] should in the opinion of the *Office* be considered in a different light. For one thing, unlike the professional corporations, these groups have not been entrusted with the responsibility of public protection by the legislature. Thus, except in cases of misrepresentation, any guides they may circulate have neither the same official character nor the same impact on the public as those coming from a professional corporation or embodied in tariff regulations.

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[198] This recommendation is similar to that of the independent committee appointed by the Minister of Consumer and Corporate Affairs, supra, note 109, p. 143, suggesting that the professional corporations be relieved of the power to suggest 'appropriate' fee levels, at least in a market economy.

[199] See above, note 10.

For another, since the basic role of these organizations is the promotion of their members' socioeconomic interests, the suggesting of fees for members' services is quite normal and would be difficult to oppose. This is all the more true in that the professional world is accepting more and more the idea, explicit in the Professional Code, that protecting the public is the principal function of the corporations, and that protecting the economic interests of professionals should be transferred to the associations.

Moreover, the risk that the establishment of fee guides by these groups might result in systematic price-fixing among the members of a profession and, consequently, in a rise in fees for professional services is definitely lessened by the adoption of Bill C-2, placing professional services under the authority of the Combines Investigation Act.[200] Since this law forbids any agreement between producers for the purpose of unduly restricting competition, including agreements on setting the price of their services, the professional associations' guides must, clearly, from now on limit themselves to suggesting fees , leaving their members free to follow these suggestions or not .[201] Any attempt by these groups to impose their guides, whatever sanctions they might try to enforce, could result in legal action of the kind that in the United States led to the famous case Goldfarb v Virginia State Bar.[202]

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[200] Supra, note 40.

The *Office* does not feel, then, that at present it is necessary to prohibit the drawing up of fee guides by professional associations. It intends, however, to watch this practice closely and to expose any abuses. In addition, if it turned out that the Combines Investigations Act could not effectively counter such abuses, it would not hesitate to make representations to the appropriate authorities in order to have the Act amended. The public should not have to shoulder the cost of anti-competitive practices by the professional associations or unions, whose members after all enjoy an official monopoly of practice or title because they belong to a professional corporation.

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[201] This prohibition arises from section 32 of the Combines Investigation Act, idem; see below, pp. 185-194 . For an example of the legal action possible against a professional association under the terms of this section, see R v British Columbia Professional Pharmacists' Society, 1971, 17 D.L.R. (3d), 285.

[202] Supra, note 191. This at any rate is what Robert J. Bertrand, Assistant Deputy Minister of the Department of Consumer and Corporate Affairs, and Director of the Bureau of Competition Policy, seemed to be saying in a speech to the British Columbia Section of the Canadian Bar Association, supra, note 93, pp. 3-4: "Advisory or recommended fee schedules are not necessarily unlawful price-fixing conspiracies. Such a tariff published purely for its informational content and in respect of which the members of the Bar are free to deviate as to the actual fees imposed without fear or recrimination, censure or other sanction being imposed, is generally considered not to fall within the scope of a price-fixing conspiracy.

It is essential that the advisory nature of such tariffs be readily evident and that the tariff not be a ploy for a price fixing agreement. Thus, if upon any increase of the minimum fee schedule all members of the association were found to immediately adopt and adhere to the new rate level as a matter of practice, or if the tariff was adhered to without deviation among all or a substantial portion of the members of the Association, the situation might provide me with grounds to initiate an inquiry."

Similarly, the *Office* intends to keep a close watch over the professional corporations to see that they do not in practice adopt the fee guides drawn up by the professional associations to which their members belong, by consistently using the guides in accounts conciliation and arbitration for example. In this way they might all too easily evade the prohibition which the *Office* is proposing on the diffusion of such guides.

CONCLUSION

The study, described in these first two chapters, of the two possible formulas for the regulation of fees and the types of schedules they might entail has led the *Office* to conclude that the effects on quality and availability of services and on public information claimed for these tariffs by the professional corporations are marginal, if not ineffectual or even non-existent.

In the *Office*'s view, it is difficult to make any serious claim that a tariff can directly and systematically influence the quality of services; it would in any case seem to be superfluous, since quality is assured by specific professional laws. As for the main problems of availability of services which were examined, maintaining a satisfactory level of availability overall, regional distribution, safeguarding the small office, and protecting professionals from big clients, businesses and institutions for example, the *Office* has found that their solution does not lie in setting compulsory fee schedules but rather in dealing directly with the situation. And finally, informing the public on professional fees , to be effective, requires measures very different from those of fee-setting.

It seems to the *Office* that the only explanation for intervening by means of a tariff is a desire to influence the level of fees in the professional services field; tariffs of fees have no other role. And it appears that whatever the intended effect on the level of fees , an increase is the most probable result, whether direct or indirect, of setting tariffs. This result is plain to be seen in the case of schedules containing compulsory minimums, but it is equally characteristic of the other types, since an analysis of them shows that each of them can in some way and to some degree contribute to an increase in fees for professional services.

Consequently the *Office* has concluded that setting tariffs of professional fees cannot be justified, either by the results that have traditionally been attributed to it, quality and availability in particular, or by those that it might have on fees for professional services. There is no reason at all to add fee-setting to the already imposing number of regulations which exist in the professional services sector: the *Office* does not see why the professionals should be insulated against the laws of the open market by regulations highly favourable to them.

Although setting a tariff of professional fees is unnecessary for the protection of the public, and may even be harmful, this is not to say that nothing can be done about fees for professional services. On the contrary, this conclusion has led the *Office* to opt for the third possible procedure for the regulation of fees, which consists in replacing fee-setting with certain measures intended to create more effective fee competition.

CHAPTER THREE: REJECTION OF THE FEE-SETTING PRINCIPLE AND ESTABLISHMENT OF MEASURES CONDUCIVE TO PRICE COMPETITION FOR PROFESSIONAL SERVICES

Professional fee schedules do not constitute the only restriction placed upon price competition for professional services by the regulations governing professionals. These regulations in fact contain a number of other restrictions which can indirectly affect the level of fees by interfering with the free play of market forces; this is particularly true of the rules respecting admission to corporations and advertising on the part of professionals.

Just as it has rejected the fee-setting principle, the *Office* also thinks it is necessary to tone down certain other regulatory measures which tend to protect the fees charged for professional services from the influences at work in the market. Without denying the special nature of professional services, the *Office* has every reason to believe that in this sector, as in many others, the introduction of measures encouraging more price competition is the most appropriate move for assuring the best use of resources at the lowest possible cost.

With this end in view, in this chapter the *Office* intends first to show that there already exist on the professional services market factors which favour price competition, and second to describe the measures which should be taken to encourage such competition.

I. Factors encouraging price competition for professional services

The framing of policies encouraging price competition does not call for radical changes within the professional services market. Indeed the *Office* considers such policies to be compatible with the nature of the professional services sector where there already exist a number of factors conducive to such competition, whether it is a question of forces inherent in the professional services market or of legislative measures prohibiting any existing practices which may restrict competition.

Before proposing specific measures to promote greater price competition, it would be wise to examine briefly the principal natural forces at work in the market which encourage competition and give a summary analysis of the legislative measures recently adopted for the purpose of allowing these forces free play.

A. Natural forces encouraging price competition

The major restrictions on competition in the professional services sector may give the impression that this market, by its very nature, does not lend itself to the kind of competition usually found in other sectors of the economy. According to the *Office*, however, the situation is quite the contrary: the professional services market seems tailor-made for effective price competition. This characteristic derives principally from: (1) an unusual market structure due to the type of investment required of the professional, (2) the possibilities open to the consumer for alternate professional services, (3) the bargaining power exercised by institutional clientele and (4) the degree to which certain commodities or services offered by professionals have become standardized.

1. Unusual market structure due to the type of investment required

According to existing professional regulations, the indispensable prerequisite for entering a profession is possession of specific theoretical and practical knowledge. Thus the investment required of the person who wishes to be admitted consists essentially in the time and resources devoted to the acquisition of the appropriate training.

Then, after obtaining the diploma required for admission to professional practice and fulfilling the other conditions demanded by his corporation, a professional often has only a modest financial investment to make - lower at any rate than that required to produce or sell merchandise - in order to enter the market as a self-employed producer. Armed with his capital of knowledge, attested to by the permit issued by his corporation, the professional is a potential producer, able to launch into the market and compete with the professionals already in practice.

Although not all the new professionals who enter the market every year immediately attempt to practise privately or with a few colleagues, this is an option open to them throughout their whole careers. Because of this possibility, in most professions there is a multiplicity of offices varying widely in size, large offices splitting into a number of smaller ones, and conversely small offices merging to form larger ones.

The fact that professionals practise in a large number of small offices rather than a few large ones creates a market structure that is not monopolistic,[203] but particularly conducive to competition: the consumer has a wide choice of professional offices where he can obtain the services he needs. Although such a market structure does not necessarily exist for all professions - in fact, for some, engineering and forestry engineering, in particular, the necessity of major financial investments tends rather to promote office consolidation[204] - it is characteristic of the greater portion of the professional services market and is likely to constitute a major competitive factor.

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[203] The opinion of the Economic Council of Canada is interesting in this regard: "The level of concentration - the extent to which a small number of firms account for the bulk of an industry's output - has an important bearing on the state of competition in an industry. Where concentration is high, so too are the risks of strong market power, low competitive pressure, inefficiency and poor resource allocation." Supra, note 53, p. 79. However, it should be noted that a large number of small offices is not necessarily a guarantee of effective competition; see note 109 above and the corresponding text.

2. Possibilities open to the consumer for alternate professional services

One of the competitive forces likely to affect the cost of professional services offered in private practice is the fact that under certain circumstances the consumer may substitute for the professional service he needs another service he considers equivalent or one offered at a fee that suits him; professionals must take this possibility into account when setting their fees. For example, if they are considering a fee increase, they must face the fact that the benefit they expect to gain may be cancelled out by a decrease in the demand for their services to the advantage of other categories of professionals or persons offering equivalent services at an attractive rate.

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[204] In dentistry the high initial investment for equipment does not necessarily seem to have promoted practice in average-sized offices. This situation is no doubt partly attributable to the particularly propitious economic position of this profession, demand considerably exceeding supply.

Of course, this factor will not have the effect of preventing all fee increases since it applies only to those professional services which can be replaced by others. There are a fair number of these however, in several professions, encompassing in fact all services which are not exclusively reserved to the members of a particular professional corporation.

First, this is true of the services offered by the members of the 17 corporations with reserved titles. They may be competing with members of other professional corporations and persons who are not members of any professional corporation. This multiplicity of available producers ensures competition, which prohibits or at least curbs unwarranted price increases.

It is also true of a fair number of services offered by the members of certain professions with the exclusive right to practise. They must face some degree of competition when they perform acts which are not directly included in their field of exclusive practice, as is frequently the case, for instance, for chartered accountants, engineers and architects, or when they perform services respecting which they share exclusive rights with another profession. Dentists and denturologists compete with respect to certain dental prostheses, as do ophthalmologists and optometrists in the fitting and sale of contact lenses.

The impact of this competitive force is stronger still when the consumer may substitute for services for which he must pay directly those which are offered free of charge by salaried professionals practising in public institutions, or by professionals who are in private practice but are paid by a public plan such as health insurance. This means that persons practising the same profession but in different situations may come into competition; physiotherapists and dieticians in private offices must compete with their counterparts in public institutions. It may also mean that members of distinct professions are competing, as in the case of the services of chiropractors, podiatrists and psychologists, which must be paid for directly by the public and those of physicians which are paid for by the *Régie de l'assurance-maladie*.

However, the *Office* does not wish to accord any absolute character to this particular competitive force. First, it does not necessarily apply to all professions and even when in principle professional services can be replaced, in practice substitutes may be rather scarce. Moreover, when the demand for services is very high, the cost of substitutes may become comparable to that of services rendered by members of the professional corporations. Finally, the force is likely to be less significant in regions where the population is sparse and there are few available producers of services.

In spite of these limitations, the *Office* sees in the possibility of alternate services a force which may make a considerable contribution to keeping professional fees at a reasonable level. Its strength depends essentially on the information available to the public regarding the professional services offered and their cost; and it must be acknowledged that at the present time this information cannot always be readily obtained. However, the *Office* believes that the measures proposed in section II of this chapter to promote the distribution of information regarding professional services will enable the public to benefit more from this natural market force.

3. Bargaining power exercised by institutional clientele

The nature of the clientele seeking professional services varies from one profession to another. While the members of certain professional corporations offer their services only to individuals, those of others do business almost exclusively with an institutional clientele. Some professionals may have both individuals and institutions as clients.

The type of clientele served by professionals is important because it may have a determining influence on the fees set. The individual client usually finds himself in a weaker position[205] than the professional consulted, particularly in determining the fee for the service required; the institutional client on the other hand is generally in a position to really negotiate the cost of the services desired.

This state of affairs is emphasized by certain professional corporations that say they are in favour of a minimum fee schedule precisely because it helps prevent price decreases that large purchasers of services may force upon professionals.[206] It also seems to be recognized by the institutional clientele, because the *Conseil du patronat*, representative of a large segment of this clientele, asserts in its brief:

> We have already stressed the fact that certain categories of professionals do most of their business with institutional clients, such as governments or business firms. In the opinion of the C.P.Q., this type of clientele is perfectly capable of protecting itself without the Government's intervention through mechanisms which would necessarily be unwieldly.[207]

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[205] In its brief, supra, note 71, p. 2, the Consumers' Association of Canada (Québec) stresses the weaker situation of the individual consumer with respect to the professional: "Whereas our Civil Code assumes equality between the contracting parties and free negotiation of the reciprocal obligations within the framework of the contract, the consumer, taken individually, is clearly in a very obvious state of inferiority in relation to the professional both in determing (sic) the quality of his services and in setting their cost."

[206] See above, pages 90-94.

[207] Supra, note 55, p. 4.

A similar situation seems to exist in other sectors of the economy. Thus, the Consumer Protection Act distinguishes between the individual client and the institutional client, offering protection to the former only.[208]

The superior bargaining power of the institutional client is derived first from the fact that it is generally better informed than the individual client and has the resources to assess the fee for the service offered and its quality. The volume of demand it can generate is also an asset in negotiating fees; in certain cases it can even avoid having to call upon the services of professionals in private practice by engaging a professional employee who is able to meet its needs.[209]

The strong position of the institutional client may constitute a considerable restraint on unwarranted increases in professional fees. In the opinion of the *Office* this restraint may also benefit the individual client: he is less likely to face artificial increases if there are clients on the market that are sufficiently strong to curb the increases. Here again, however , the individual consumer will benefit more if there is greater information available regarding the services offered and the fees. In this context, in effect, any knowledge available to the individual client regarding the relatively low rates offered to institutional clients obviously increases his bargaining power with professionals, even if the fact of requiring comparatively few services does not enable him to negotiate fees of the same order.

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[208] S.Q. 1971, c. 74; section 1(d) of the act defines the consumer as a "physical person who is a party to a contract in a capacity other than that of merchant", thus excluding the institutional consumer. It should be noted that section 1(c) of Bill No. 7, to replace this act is practically identical: Consumer Protection Act, (First reading), 1976, Fourth session, 30th Legislature (Qué.)

[209] See John Crispo, supra, note 51, p. 31.

However, this third competitive force has its limitations, as do the others. First, it does not apply to the many professionals in the field of health and human relations, who render services almost exclusively to individual clients. Second, it should be recognized that certain institutional clients may also be in a weaker position than professionals when fees are negotiated[210] and that others may prefer to use their bargaining power to attempt to obtain other advantages, such as greater speed in the performance of the service. Third, the competition introduced by institutional clients may not benefit the individual client if the services required by each are quite different.

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[210] Small firms and certain private non-profit organizations, for instance.

Despite these reservations, the *Office* believes that this third competitive force is a very important factor in that it is likely to become operative in the case of members of professional corporations who have a clientele that is wholly or partly institutional, i.e. those working in the fields of engineering, planning, business and law. It is particularly important in that these are essentially fields in which professional services are not covered by universal aid or social insurance plans, and they probably never will be, precisely because most of the clients are institutions.

4. Degree to which certain commodities or certain services offered by professionals have become standardized

In the commodity trade sector, competition depends partly on the possibility open to the consumer to compare prices of items intended for the same use. The professional services market is not exempt from this competitive force. On this market, in fact, there are certain goods and services that are well known to the public because they are fairly standard or frequently used; this makes possible an appreciation and comparison of the various rates charged by professionals.

This competitive force appears principally, of course, in the few professions where the rendering of a service is usually accompanied by the sale of a commodity. Pharmacists and veterinarians, optometrists, dispensing opticians, hearing-aid acousticians, dentists and denturologists come to mind for the sale of pharmaceutical products, and optical, auditory and dental prostheses respectively.

In the case of pharmaceutical products, it is easy for the public to compare prices, since the various forms in which they are offered to the public are generally identical for every distributor. Moreover, when standard sizes do not exist for a particular product, the public nevertheless has a reference point in the basic unit for the product: tablet, tube, suppository, ounce, cubic centimetre, etc.[211]

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[211] As a matter of fact, in the case of pharmaceutical products sold by pharmacists, the public can know the price ahead of time since a fair number of medications are available directly on the premises of the pharmacy, along with their prices. The possibility open to the consumer to compare prices before purchasing also holds for prescription drugs which the pharmacist must keep behind the counter. In fact, using the price list for these drugs and the table of concordance between their generic names and their various brand names, which must be available in every pharmacy, the client should have the information necessary to demand that his pharmacist supply the least costly substitute for the drug prescribed by his physician; in this connection, see the Regulation respecting advertising of the Order of Pharmacists, Québec Official Gazette, Part 2, August 13, 1975, p. 4611. It should, however, be mentioned that difficulties have been encountered in enforcing the regulation because it has been contested before the courts.

The situation is slightly different with respect to optical, auditory and dental prostheses because these are designed for a single person. However, the physical nature of the prosthesis and the fact that it is necessarily standardized up to a certain point in spite of the particular features required in fitting each client generally provide a sufficient number of reference points to enable the client to make some advance comparison of various market prices.[212]

This competitive force may also occur in professions whose members do not sell goods. A fair number of professional services offered to the public are in fact sufficiently standardized to be easily identified by the public and the fees compared.[213]

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[212] In the field of optical and auditory prostheses as in that of pharmaceutical products, the *Office* is aware that manufacturers exert a control over the market which has a marked effect on the price structure. However, it does not believe that price competition is therefore impossible, because practices restricting competition which may exist in these sectors are prohibited by the Combines Investigation Act. Thus the optical prostheses sector was recently subjected to an investigation by the Director of Research and Investigation under the Combines Investigation Act; his compilation was completed on July 4, 1975 and is entitled: Material collected for submission to the Restrictive Trade Practices Commission in the course of an inquiry under section 47 of the Combines Investigation Act relating to the production, supply, distribution and sale of ophthalmic goods in Canada, Ottawa-Hull, Department of Consumer and Corporate Affairs. Following this investigation, the Restrictive Trade Practices Commission held public hearings on the question, but its conclusions have not yet been published.

[213] For examples of standardized professional services, see below, pages 261-262.

Of course, all professional services vary as to the manner in which they can be administered. However, for a number of them the variance is limited with the result that the nature of the service is not basically affected and remains readily identifiable and familiar to the public.

The fact that in some operative fee schedules, as well as in a number of the fee schedules drawn up for the purposes or social aid or insurance, the rates are established on the basis of a classification of professional acts, is certainly evidence that many professional services can be identified and defined with a certain precision. The existence of these standarized services makes it possible to compare the fees charged by professionals and is conducive to competition on the professional services market.

Although the *Office* considers this fourth force to be very important, it is quite aware of its limitations. First, it obviously does not affect all the services rendered in every profession. Moreover, once again, its effectiveness depends to a large extent on the information available to the consumer, regarding both the nature of the professional services and their cost.

The natural forces of the professional services market, the existence of which the *Office* has just underlined without claiming to be exhaustive, are of varying intensity depending on the profession, of course. It may however be noted that one or more of them affect almost all the professions in which some members are in private practice.

In describing these forces, the *Office* is not attempting to establish their respective degree of effectiveness in the various professional sectors or for each profession. Rather it hopes to demonstrate that, although at the present time these forces are often more potential than real, their existence is in itself a contributing factor in making the professional services market a sector that does not differ fundamentally from others: price competition for services offered does exist.

This is no doubt also the conclusion reached by the federal government which recently decided to extend to the field of professional services the application of certain legislative measures intended to promote competition. The nature of these measures, which are to be found in the Combines Investigation Act, should now be described briefly.

B. Legislative measures encouraging price competition

In Canada, until 1976, the provisions of the Combines Investigation Act applied only to commodities. The distribution of services remained almost entirely outside the control of this act. This exception in favour of a significant part of the tertiary sector of economic activity[214] was one of the most severely criticized aspects of the legislation. The situation seemed particularly abnormal since Canada was one of the few industrialized countries of the West in which such a distinction between goods and services was still maintained for the purposes of applying anti-trust legislation.[215]

Thus, in 1969, when the Economic Council of Canada recommended in its Interim Report on Competition Policy a series of amendments to the Combines Investigation Act, one of its principal proposals was to extend application of the act to the service sector:

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[214] In its Interim Report on Competition Policy, supra, note 53, p. 141 , the Economic Council of Canada estimated this part of the tertiary sector at about 20% of the gross domestic product.

[215] See Economic Council of Canada, idem, p. 144.

> Thus the conclusion can be drawn that while there are important differences in the nature of the products supplied by goods and service industries respectively, these differences are not such as to render an efficiency-oriented competition policy less relevant for service industries. On the contrary, it may in some ways be more relevant.
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> . . .
>
> There is much to be gained by extending competition policy to all commercial activities including services.[216]

With regard to professional services more specifically, the Council saw no reason for granting them a general exemption and recommended that they also be subject to the Combines Investigation Act. The Council approached the problem in the following terms:

> The lack of published evidence forces a resort to conjecture, but it is likely that past reluctance to extend the Combines Act to service industries may have stemmed partly from an unwillingness to interfere with the time-honoured custom of allowing professional bodies to fix their own fees and control entry into their professions. More recently, however, such developments as the emergence of new arrangements for financing medical care have drawn public attention to fee-setting and other economically significant practices of professional bodies. It has become highly appropriate to consider anew why these practices should not be subjected to some suitably structured system of checks and balances.[217]

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[216] *Idem*, pp. 146 and 157.

[217] *Idem*, pp. 148-149.

In Bill C-2, the first of two phases in the review of Canadian competition policy,[218] the federal government gave effect to the recommendations of the Economic Council of Canada. Thus, since certain provisions of the act came into force on July 1, 1976,[219] the Combines Investigation Act has applied to all services "of any description whether industrial, trade, professional or otherwise".[220] In order to clarify the manner in which the act is likely to have a positive effect on price competition for professional services, the *Office* considers it necessary to describe briefly the principal prohibitions applicable to professionals: agreements to restrict competition, mergers and monopolies, price maintenance, unwarranted price cuts, bid-rigging and publication of misleading information.

1. Agreements to restrict competition

The most important measure is undoubtedly provided for in section 32 which, in very general terms, prohibits any type of agreement which would have the effect of limiting, to the public's detriment, the facilities for distribution of professional services, of increasing rates in an unreasonable fashion or of restricting competition unduly in any other manner. Under this broad provision, unions, associations and other organizations of professionals are not permitted to require their members to respect a particular fee schedule.[221] However, the scope of the section is not limited to agreements on fees and could penalize professionals who make agreements for the purpose of improperly cornering part of the market or a particular clientele.

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[218] See above, notes 40, 110 and 200, and the corresponding text.

[219] Most of Bill C-2 came into force, however, on January 1, 1976.

[220] Supra, note 40, section 2.

However, it must be stressed that the anti-combines act provides for a means of defence against action that could be taken under section 32. Thus a person cannot be charged under the section if the agreement to which he is party applies only "to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public (a) in the practice of a trade or profession relating to this service; or (b) in the collection and dissemination of information relating to such service."[222] Government intervention cannot be regarded as illegal if, for the purpose of protecting the public, it establishes precise rules respecting the competence and integrity of the producers of services.

This exception seems to be based on jurisprudential decisions to the effect that federal and provincial regulations, although they may in fact restrict competition, are not violations of the Combines Investigation Act because it is presumed that they are made in the public interest. This is in fact one of the reasons that the regulations established under the Professional Code are exempt from the provisions of the Combines Investigation Act.[223]

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[221] See above, pages 164-165.

[222] Supra, note 40, section 32 (6).

2. Mergers and monopolies

Not every merger or monopoly is prohibited by law, only those that restrict competition to the detriment of the public.[224] Despite this compromise the two-fold prohibition constitutes a certain guarantee for those who might fear that in the absence of a regulatory fee schedule and because of the measures advocated by the *Office* to promote competition, the larger offices of professionals could swallow up the smaller ones, taking control of part of the professional services market for their own profit.

3. Price maintenance

According to section 38 of the act, no one who is engaged in an enterprise, including a professional office, may

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[223] See A. Tremblay, supra, note 41, and Department of Consumer and Corporate Affairs, Proposals for a New Competition Policy for Canada, First Stage, 2nd edition, Ottawa, Information Canada, November 1973, pp. 22-26.

[224] Supra, note 40, sections 2 and 33.

> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or
> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the pricing policy of that other person.

This section assumes a certain importance when the absence of a compulsory minimum fee schedule allows certain professionals to reduce their fees, as it gives them a measure of support against those who might try to induce them to charge the same rates as other professionals.

4. Unwarranted price cuts

Under section 34 of the act, it is a violation for an enterprise to practise a policy of selling products at unreasonably low prices or a policy of selling products at prices that are lower in one region than those charged in another, for the purpose of reducing competition or eliminating a competitor. Prohibition of these two restrictive practices is another form of protection for small professional offices in the face of competition from larger ones.

5. Bid-rigging

According to section 32.2 of the act, persons able to respond to a call for tenders must not secretly conspire to have one of their number refrain from tendering or to submit bids that are the result of collusion. This provision affects in particular the professions in the field of engineering and planning whose members do business with an institutional clientele.

6. Publication of misleading information

Section 36 of the act prohibits anyone from providing the public with misleading information "for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever". In addition to this general prohibition, section 36 contains special provisions that prohibit supplying false or insufficiently proven information[225] in the form of a warranty or certificate of efficacy and giving misleading information on the price at which a product is generally sold. Although these provisions do not constitute measures that directly favour competition, by guaranteeing the truth of the information supplied to the consumer they do afford him greater safety in negotiating the conditions for a professional services contract.

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[225] See also section 36.1 of the act.

Finally, it should be stressed that, in addition to these legislative measures prohibiting certain practices that have the effect of restricting competition, a number of amendments were made by Bill C-2 to the Combines Investigation Act in order to make it easier to apply, because in the past there had been countless difficulties.[226] For example, the amendments make it possible to issue temporary injunctions to prevent restrictive practices,[227] render more flexible the elements of proof necessary to demonstrate that certain restrictive practices have been used,[228] reinforce the penalties imposed on persons found guilty of certain offences,[229] and enable persons who have been victim of them to collect damages.[230]

With respect to effective application of the act, other important measures are still to come. In fact, in Bill C-42, the second phase in the review of the Canadian competition policy,[231] which also amends the Combines Investigation Act, major changes are proposed for the specific purpose of facilitating application of certain rules governing competition provided in the act. Thus, for example, Bill C-42 should make it possible in cases of mergers and monopolies to issue, in addition to the penal sanctions already applicable, corrective orders intended to prevent or eliminate the unfavourable effects of these restrictive practices.[232] The bill will also authorize recourse to class action for damage claims which can be instituted by consumers who are victim of violations of the Combines Investigation Act.[233]

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[226] See Department of Consumer and Corporate Affairs, Proposals for a New Competition Policy for Canada, Second Stage, Ottawa, Department of Supply and Services, March 1977, pp. 1-2.

[227] See section 29.1 of the Combines Investigation Act, *supra*, note 40.

[228] See for example section 32 (1.1) for agreements to restrict competition and section 36(4) for publication of misleading information.

[229] See for example section 32 (1) for agreements to restrict competition, section 36 (5) for publication of misleading information and section 38(8) for price maintenance.

[230] See section 31.1

By guaranteeing that, in the absence of regulatory fee schedules, there will still be certain rules controlling the establishment of rates on the professional services market, the measures provided by the Combines Investigation Act lend weight to the position of the *Office*. However, the *Office* is aware that in the field of professional services, the effectiveness of the legislative measures conducive to competition that have just been described has yet to be demonstrated. Nevertheless, the fact that, in the course of both phases of the revision of the Canadian competition policy, major amendments in the anti-combine legislation have been made or proposed shows the federal government's determination to make its intervention effective and, in the public interest, bodes well for the maintenance of price competition for professional services.

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[231] See above, notes 40 and 110. This bill, which implements some of the recommendations of the Independent Committee appointed by the Minister of Consumer and Corporate Affairs, supra, note 109, was tabled for first reading on March 16, 1977, and sent to the House of Commons Standing Committee on Finance, Trade and Economic Affairs for study on March 25.

[232] See section 26 of Bill C-42. It should be noted however that section 31 of the Bill does not provide for the possibility of criminal proceedings except in the case of monopoly.

[233] See section 34 of Bill C-42.

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The number of factors favourable to price competition in the professional services sector suggests that prices could be set in accordance with the same rules as those governing most sectors of the economy. In effect, many of the natural competitive forces found in these sectors are latent in the field of professional services and could apply to it. It seems that this point of view is shared by the federal government because the rules it has decided to apply to the professional services sector are generally the same as those governing other services and products.

While in principle the professional services sector is comparable to many others with regard to price competition, in practice it differs considerably. In Québec, at any rate, there is really littl effective competition in this sector that can benefit the consumer. According to the *Office*, this situation is due largely to the present state of the regulations controlling the professions.

As a matter of fact, certain regulations of the professional corporations have the effect of directly or indirectly preventing almost all price competition among professionals, as do regulatory fee schedules. Thus, for example, the little information available on professional services, because of the restrictions placed on advertising by professionals, has the result, as we have stressed, of compromising the effectiveness of the natural market forces. This also holds true for the implementation of the legislative measures intended to guarantee competition: how is it possible for consumers to know of and denounce a practice of price maintenance or excessive pricing if they are not in a position to know the amount of professional fees charged by the various professionals on the market?

With a view to making the factors potentially able to promote competition on the professional service market truly dynamic and effective, the *Office*, without questioning the whole body of professional regulations, now intends to recommend certain changes designed to foster price competition for these services.

II. Measures advocated by the *Office* to promote price competition for professional services

The abolition of regulatory fee schedules advocated by the *Office* and the presence of factors conducive to price competition for professional services cannot by themselves guarantee effective competition. This can only be ensured by intervention intended to modify certain of the existing rules on the professional service market, respecting both the supply of and the demand for services.

The *Office* believes, in fact, that it is an illusion to think that true competition will affect fees for professional services unless the following two conditions prevail: first, that the supply of services is sufficient, in other words that the number of professionals rendering the services is high enough to meet the demand adequately; second, that the consumers of professional services have an appropriate knowledge of the services offered and their cost. Therefore, the *Office* is proposing changes in the professional regulations in order to increase the availability of the services offered, on the one hand, and, on the other, public information regarding these services and their cost.

A. Measures respecting the availability of professional services

A sufficient number of professionals to meet the demand constitutes the first condition necessary to ensure reasonable price competition for professional services. It is obvious that if the number of producers of professional services is insufficient for the demand, these producers will be in a strong market position and their interest in competing will be considerably reduced. As Professor Gordon E. Kaiser has stressed, such a situation could give rise to a de facto fee schedule on the market:

> If there is an abundant supply there will be a fair degree of price competition. If there isn't ample entry into the profession a de facto tariff may develop even where none formally exists. If follows that the mere abolition of fee tariffs through Combines remedies may not actually promote the degree of price competition. Ultimately, it is all going to depend upon the degree of supply to the profession or trade.[234]

According to the *Office*, maintaining the availability of professional services at a sufficiently high level does not, in the present state of the professional services market in Québec require any basic rethinking of the existing control mechanisms likely to influence this availability.

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[234] "Federal Competition Law and the Professions", paper delivered at the conference on The Professions and Public Policy, Toronto, October 16, 1976, pp. 29-30.

First, the *Office* must acknowledge that the various factors which can influence the availability of professional services are not all related to the regulations; for instance, the control exercised by the colleges and universities over the number of students admitted to courses leading to a profession constitutes a major factor in this respect.[235] It would therefore be a mistake to claim that the question of the availability of professional services depends solely on the regulations governing the professions.

Moreover, the *Office* does not think that the fact of changing these regulations radically, on the grounds that they may decrease availability, would be a step conducive to protection of the public. In fact, although such protection requires that sufficient numbers of producers be available, it also requires that certain controls be established with respect to quality to preclude entry into the professions of persons not qualified to render such services.

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[235] To illustrate application of this control, see "Admissions sélectives" (Selective acceptance), (1977) 12 Au fil des événements, No. 15, April 21, 1977, p. 3. This article contains a table showing that of the 13 programs offered at Laval University for which registration is on a quota basis, 10 lead to a profession. With regard to the importance of this control, see in particular Gordon E. Kaiser, idem, pp. 34-37; also Richard A. Ward, "Licensure of Health Care Professions and Health Care Delivery", (1975) Hospital Administration, 47, which even advocates transfer to the universities of the professional corporations' power to control the admission of new members.
Finally, the *Office* itself is now engaged in a study regarding the training of professionals, dealing with questions such as control by colleges and universities of admission to programs leading to professions.

In the present context, the *Office* does not believe that the requirements of availability must take precedence over those of quality. First, at this point nothing would justify questioning all the control mechanisms intended to ensure the quality of professional services; moreover, it is partly because of their existence that the *Office* has been able to reject in this report certain arguments in favour of the principle of setting minimum fees for professional services.[236]

Second, no study has yet shown clearly that in Québec these controls have a significant or unwarranted influence on the availability of professional services. In addition, although a certain lack was discernible 15 years ago in certain sectors, educational reform has largely corrected the situation by making it possible for a large number of new professionals to enter the market[237] and fill the major gaps. Of course, the *Office* recognizes that there are still some professions, such as dentistry, where a problem of general availability of services exists, and others where there are more specific problems restricted to certain regions.[238] However, at this time the availability of professional services in general does not appear to be a major problem. In fact, the demographic and social context at the present time[239] seems to favour a relative availability of professional manpower, quite aside from the effects of professional regulations.[240]

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[236] See above, pages 54-57. With regard to the respective importance of the requirements of quality and of availability, see Philip Slayton, "Professional Education and the Consumer Interest", in Four Aspects of Professionalism, Ottawa, Canada Consumer Research Council, March 1977.

[237] This was made easier by the development of the educational system at the secondary and college levels, free instruction at these two levels, and the system of loans and bursaries for colleges and universities which made access to programs leading to professions more democratic.

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[238] For example, the dearth of certain medical specialists in some regions in particular comes to mind. With regard to the problems of availability encountered among physicians, see above, notes 100 and 102.

[239] With respect to the situation in Ontario, see Z. Zsigmond, G. Picot, M.S. Devereaux and W. Clark, Future Trends in Enrolment and Manpower Supply in Ontario, Statistics Canada, April 1977. This study forecasts that for the next 15 years there will be a surplus of highly qualified manpower and, as a result, its under-employment because of the demographic explosion of the postwar period and the continuing increase in the general level of education. According to these forecasts, the self-governing professions will be less affected by the lack of balance between supply of and demand for personnel with a post-secondary education, but not absolutely exempt from it. In Québec, certain professional corporations think that there is already a surplus of professionals; see the comments of Me.* André Brossard, batonnier* of Québec, concerning lawyers in an article entitled "La société a-t-elle besoin d'avocats chômeurs?" (Does society need unemployed lawyers?), (1977) 9 Barreau '77, No. 3-4, p. 3.

[240] However, the *Office* is aware that cyclical variations related to social and demographic phenomena may cause significant medium and long-term fluctuations in the availability of services in Québec.

*No English equivalents exist.

The *Office* is therefore proposing recommendations which, without affecting the principles of professional controls which have an effect on the availability of services, are intended to adapt them by supplementing certain of the measures taken in 1973 with the enactment of the Professional Code. These recommendations are essentially for the purpose of making certain slight modifications to the two principal control mechanisms that affect availability of professional services. These mechanisms are the exclusive right to practise a profession and control of admission to professional corporations.

1. Exclusive right to practise a profession

For the purpose of protecting the public, granting of a field of practice exclusively to the members of one professional corporation may create a few difficulties, particularly in relation to the availability of services.[241] In fact, certain consequences of such a practice, limitation of the numbers of producers of services and the difficulty of adjusting the definition of fields of practice to the requirements of efficient distribution of services for instance, can have an unfavourable effect on the availability of services reserved exclusively to the corporation in question.

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[241] With regard to the difficulties raised by this practice in other respects, see The Evolution of Professionalism in Québec, supra, note 42, p. 64.

However, according to the *Office*, the exclusive right to practise does not constitute an insurmountable obstacle to reasonable price competition for professional services. One of the facts supporting this opinion is that certain natural forces favouring competition may operate even in professions with this right.[242] The *Office* nevertheless remains aware of the necessity for making certain adjustments in the mechanism in order to limit its negative effects on the availability of professional services.

In this perspective, the technique of delegating professional acts is a very important instrument. This technique, for a professional corporation holding an exclusive right to practise, consists in determining by regulation which of the acts forming part of the field of exclusive practice of their members can be delegated to other groups of persons.

By enabling persons other than the members of the profession with the exclusive right to practise to perform certain acts normally reserved to the latter, this technique obviously ensures greater availability of the services involving these delegated acts. Moreover, it increases the availability of services which are not delegated, by enabling the members of such professional corporations to devote more time to them.[243]

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[242] See pages 170-184 above.

However, present legislation allows delegation of acts for only seven of the 21 professional corporations with an exclusive right to practise.[244] As any field of exclusive practice may considerably affect the availability of the services covered, the *Office* believes that it should be possible to make this technique general in spite of any difficulties that may have been involved in the preliminary stages of implementing it in the field of medicine and nursing care. The *Office* therefore recommends that the regulatory power to delegate acts be extended to all the professions holding exclusive rights to practise. It also recommends that, as in the case of professions that now have this power, the power be subject to the authority of the *Office* enabling it to adopt or amend a regulation delegating acts in the stead of a corporation if this corporation fails to do so.

Moreover, in a context in which ever-increasing specialization entails the appearance and growth of new professions, even in the fields which have not yet been affected by this development,[245] the *Office* intends to see to the adaptation of the present fields of exclusive practice so as to ensure, first, that they do not endanger the general availability of services and, second, that they adjust constantly to the evolution of professional activity and to the needs of society. Thus if the *Office* were to note for example, because of the development of new techniques, that certain acts reserved to the members of a professional corporation alone could be safely performed by someone else, it would not hesitate to recommend to the government that legislative amendments be made so that these acts would be excluded from the exclusive field of practice.

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[243] On delegation of acts, particularly in the field of health, see among others Richard Zeckhauser and Michael Eliastam, "The Productivity Potential of the Physician Assistant", (1974) IX The Journal of Human Resources, 95; Kenneth R. Smith, Marianne Miller and Fredrick L. Golladay, "An Analysis of the Optimal Use of Inputs in the Production of Medical Services", (1972) VII The Journal of Human Resources, 208; R.A. Ward, supra, note 235, pp. 58-59.

[244] The corporations in question are the chemists, dentists, nurses, physicians, optometrists, pharmacists and podiatrists.

2. Control of entry into professional corporations

The control of admission of persons qualified to practise a profession or hold a title is one of the traditional functions of professional corporations. Since these corporations were entrusted by the legislator with the task of maintaining the quality of the services offered by their members, admission seems to be the appropriate occasion for making sure of the competence of their future members.

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[245] By way of example the appearance of legal technicians and " people's lawyers" in the field of law could be considered. See Larry Taman, "The Emerging Legal Paraprofessionals: Herein of High Priests and Acolytes", paper delivered at the conference on The Professions and Public Policy, Toronto, October 15, 1976. For a more general treatment of the evolution of needs in the law field in Québec, see André Lajoie and Claude Parizeau, La place du juriste dans la société québécoise (The jurist's place in Québec society), *Centre de recherche en droit public de l'Université de Montréal*, June 1976.

Although this power seems essential to the protection of the public, it is nevertheless important to be certain that it is not used to limit unduly the entry of new candidates for the benefit of the professionals already in practice.[246] A number of inquiry commissions and consultative bodies have stressed this danger over the past few years. For example, the Royal Commission Inquiry into Civil Rights in Ontario, chaired by Chief Justice McRuer, had this to say:

> But it must be recognized that each of the self-governing bodies has been given a statutory monopoly through its licensing powers. What has to be guarded against is the use of the power to license for purposes other than establishing and preserving standards of character, competence and skill.[247]

The Economic Council of Canada, in its Interim Report on Competition Policy laid stress on the same matter:

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[246] See above the remarks made on this question, page 75.

[247] Royal Commission, Inquiry into Civil Rights, Report Number One, Toronto, Queen's Printer, 1968, Vol. 3, p. 1172.

> But there is also a public interest in ensuring that the power to regulate the quality of professional services is not used in an unduly restrictive way, and that the size of likely future needs for professional services is kept in mind. This aspect of the public interest is all the more relevant in an age when a large proportion of the cost of professional training is a charge on the general taxpayer.[248]

It was also because of this danger that substantial changes were made under the Professional Code, although the power to regulate entry of their members was not taken from the professional corporations. As a result of these changes, a person who wishes to be admitted permanently[249] to a professional corporation must obtain from it a permit and pay the annual dues required for his name to be entered on the corporation's list as a member in good standing. This condition is simply a financial formality and cannot influence the level of availability of professional services in any significant manner.

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[248] Supra, note 53, p. 151. See also Canadian Industrial Relations, Report of the Task Force on Labour Relations, Ottawa, Queen's Printer, 1969, p. 139; Select Committee of the Legislative Assembly of Alberta on Professions and Occupations, Report II on Professions and Occupations, Edmonton, Queen's Printer, 1973, pp. 6-9; Paul Malles, Canadian Labour Standards in Law, Agreement and Practice, Economic Council of Canada study, Ottawa, Minister of Supply and Services, 1976, pp. 77-79. Quite recently, the Independent Committee appointed by the Minister of Consumer and Corporate Affairs, supra, note 109, p. 148, went as far as to say: "It might be observed in passing that powers to control numbers, directly or indirectly, in any professional group constitute a clear interference with the movement of the talents into areas of their choice."

[249] A person may also be admitted to a professional corporation on a temporary basis by obtaining a temporary permit or special authorization. Since these are special cases which have little impact on the general availability of professional services, the *Office* will not deal with them in this report. The same is true of the special permits provided for in certain professional legislation.

However, the issue of permits which is essential for entry to the professional corporations may have an effect. Therefore, before proposing amendments to the professional regulations regarding the issue of permits, the *Office* deems it necessary to describe briefly how this is done at the present time.

(a) Present conditions for issuing permits

A person who wishes to obtain a permit from a professional corporation must usually fulfill two requirements: first, obtain one of the diplomas recognized by the Lieutenant-Governor in Council as a prerequisite to this permit or have the corporation attest that his training or the diploma he has is the equivalent of the recognized diplomas and, second, if the corporation so requires, comply with other conditions.

Government recognition[250] of the diplomas required to obtain corporation permits is established by regulation.[251] In general the diplomas recognized are those granted by the educational institutions in Québec.[252]

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[250] Professional Code, supra, note 1, section 178 (a). It should be stressed that the Professional Code took away from the professional corporations their power to set conditions for admission to the study of a profession by entrusting the Lieutenant-Governor in Council with the power to determine which diplomas were prerequisites for permits. However, seven professional corporations retained the right to require the registration of students with the corporation during their program of study leading to entry into the profession. The corporations in question are the architects, land surveyors, chartered accountants, dentists, nurses, physicians and pharmacists.

[251] At the present, the diplomas recognized as prerequisites for permits have been determined for 26 of the 38 professional corporations. For 9 of the other 12 corporations, these diplomas are temporarily those that were required by these corporations before the Professional Code came into force. Finally, in the case of three corporations, the hearing-aid acousticians, chiropractors and podiatrists, no diploma has yet been recognized; this situation is a result of the fact that there is no program of study in these fields in Québec.

[252] Only one diploma granted by an educational institution outside Québec has been recognized by the Lieutenant-Governor in Council: the law degree (L.L.L.) from the University of Ottawa, for permits issued by the Bar and the Order of Notaries.

Furthermore, the attestation by a professional corporation of a diploma[253] or training[254] equivalence is made by the board* of this corporation.[255] Each application for an equivalence is weighed individually and the decision to grant or refuse the attestation is made in the context of the norms established in the regulations made by the board and approved by the government.[256] Since the adoption of such regulations is optional, not all the professional corporations recognize equivalences.[257]

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[253] The diplomas that can be covered by an attestation of equivalence under the Professional Code must have been issued by educational institutions outside Québec.

[254] A training equivalence makes it possible to issue a permit to a person who does not hold a diploma recognized by the government or an equivalent diploma, but who has relevant work experience and a satisfactory degree of knowledge.

[255] Professional Code, supra, note 1, s. 84 (g) and (h). This equivalence may also be certified by the administrative committee of the corporation by virtue of the general delegation of powers in section 94.

[256] Idem, section 92(f) and (g).

[257] On July 1, 1977, three professional corporations (agronomists, architects and forestry engineers) had a regulation respecting equivalent diplomas adopted under the Professional Code. One of them, the corporation of architects, also has a regulation respecting equivalent training for issuing permits. It should be noted that the regulatory power of establishing standards for training equivalences for the purpose of issuing permits was only introduced in 1975, on the recommendation of the *Office*; see sections 3, 7 and 9 of the Act to amend the Professional Code and other legislative provisions, S.Q. 1975, c. 80.

* Known as the "Bureau" in the Code.

After fulfilling this requirement by obtaining a recognized diploma or an equivalence, a candidate may, depending on the corporation in question, receive a permit immediately or be required to fulfill other conditions. These are determined in a regulation which may be adopted by the board of the professional corporation and must be approved by the Lieutenant-Governor in Council.[258] These conditions may include a professional practicum or examination, for instance.

(b) Changes proposed by the *Office* to conditions for issuing permits

The changes proposed by the *Office* for issuing permits are intended to ensure that the present system cannot under any circumstances be used to create unnecessary obstacles to entry into professional corporations of persons who have the training required to practise a profession or bear a professional title. Some of these changes deal with the preparation of regulations respecting the issue of permits, others with their application.

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[258] Professional Code, supra, note 1, s. 92 (i).

With regard to the preparation of regulations respecting equivalences and the establishment of additional conditions, the *Office* does not believe that the initiative for making such regulations should be left exclusively to the professional corporations. If a corporation refused, for example, to adopt a regulation respecting equivalent diplomas, no one holding a diploma granted outside Québec could obtain an equivalence for the issue of a permit, irrespective of the value of the diploma.

The *Office* has also observed that, although these regulations must be approved by the government after they are adopted by a corporation, this right of inspection is nevertheless limited to the approval phase. Once they are in force, no provision of the Professional Code requires the professional corporation to amend them, or enables the *Office* to do so. For instance, if, following changes in the program of studies for a diploma prerequisite for a permit, the additional conditions required by a professional corporation were no longer necessary or needed to be moderated, only the corporation would have the power to make the changes. In the event of a refusal on its part, the persons registered for this program would not have the benefit of any recourse to obtain the necessary amendments.[259]

Considering the importance of these regulations both for the individual rights of persons who wish to be admitted to the professional corporations and for the public in general, the *Office* believes that a more continuous outside control should be exercised. This is why it is recommending that a suppletory regulatory power, comparable to those it already has in a number of other fields under section 12 (u) of the Professional Code, be granted with respect to such regulations, so that it can adopt them or amend them in terms of the public interest, if a corporation fails to do so.[260]

With regard to application of the regulations, the recommendations of the *Office* deal essentially with the attestation procedures for equivalent diplomas or training. Recognition or refusal of an equivalence, even within the regulations adopted for the purpose, constitutes a much more complex decision and leaves room for far more discretion that a simple check to see whether a candidate holds the diploma recognized by the government. Moreover, as this too is a question that can affect the individual rights of the person concerned, it assumes a quasi-judicial character comparable to that of the decision of a committee on discipline regarding suspension of a professional's right to practise. Therefore the *Office* believes that certain procedural standards to guarantee the rights of the person affected by this decision must be expressly recognized by law.

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[259] If, on the other hand, reinforcement of the additional conditions proved necessary and the professional corporation failed to act, the *Office* could intervene to protect the public.

[260] In the field of health in Ontario, under section 3 (2) of the Health Disciplines Act, S.O. 1974, c. 47, the suppletory power of the Minister of Health and the Lieutenant Governor in Council covers all the regulations of the professions governed by this act, with the exception of those respecting internal management.

This is the decision that certain study commissions have reached,[261] among them, the Ontario Royal Commission Inquiry into Civil Rights. After recognizing the legal nature of the decisions of professional corporations respecting the admission of candidates who have received their training outside Ontario, it made the following recommendations:

> The process of measuring an applicant's qualifications against the established standards is essentially a judicial matter. Self-governing bodies should be required to hold a hearing in all cases before an application is rejected. At such hearing the applicant should be given the opportunity of presenting evidence of the details of the course of study he has pursued and making representations to the admitting authority . . . . A decision to reject an applicant ought not to be made without a hearing, and written reasons by the admitting tribunal

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[261] In Alberta the Select Committee of the Legislative Assembly on Professions and Occupations, supra, note 248, p. 9. made the following proposal: "RECOMMENDATION 6: That legislation provide an appropriate procedure for appeal for those who have been refused a license to practice."

> should be given in all such cases. . . .
> We recommend that a right of appeal should lie to the Appellate Division of the High Court of Justice for Ontario wherever an application to be admitted to a self-governing body has been rejected.[262]

These recommendations were adopted by the Legislative Assembly of Ontario and incorporated in the Health Disciplines Act, enacted in 1974, governing dentists, nurses, nursing assistants, physicians, optometrists and pharmacists.[263] Section 11 of the act provides that a decision by a professional corporation to refuse to admit a person or setting restrictions to his admission must give the reasons in writing and be forwarded to both the person concerned and the Health Disciplines Board[264], before which the person can then be heard. Section 11 also provides that either party may appeal from the decision of the board to the Supreme Court of Ontario.

In Québec, none of these rights, the right to a hearing, the right to a decision stating reasons or the right to appeal, is expressly guaranteed by the Professional Code with respect to equivalent diplomas or training. The *Office* believes this is a major omission with respect to individual rights and recommends that the Professional

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[262] Supra, note 247, pp. 1179-1180.

[263] Supra, note 260.

[264] This is a body consisting of members appointed by the Lieutenant Governor in Council from persons who are not members of the professions governed by the Health Disciplines Act. See sections 6 to 11 of the act.

Code be amended to provide: (1) that a person cannot be refused an equivalence by the board of a professional corporation without having had the opportunity of being heard before it or a committee appointed by it; (2) that the decision not to recognize an equivalence must give the reasons in writing and include a description of the program of study, practicum or examination necessary to obtain an equivalence; (3) that the decision not to recognize the equivalence should be open to appeal before the Professions Tribunal.[265]

The *Office* is quite aware that the measures it is proposing to ensure greater availability of professional services cannot resolve all the particular problems that the public may encounter with each profession. As mentioned before,[266] many factors affect the availability of services and most of them do not depend on the regulation of the professions. However, the *Office* believes that if the few recommendations it has just outlined are implemented, the mechanisms of professional regulation which have a direct bearing on the availability of services will not be an obstacle except to the extent required to protect the public.

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[265] Under section 50 of the Bar Act, supra, note 22, the Professions Tribunal already has a right of appeal regarding certain decisions about admission to the Bar. Under this section, a candidate who considers he has been wronged by a decision of a committee established by the General Council of the Bar for the purposes of applying the regulations respecting admission or by a decision of the examining committee, may, except with respect to the entrance examination, appeal from the decision to the administrative committee of the Bar, and then to the Professions Tribunal.

[266] See pages 197-198 above.

B. Measures respecting information on professional services

Whatever the market where producers and consumers meet, the information available to them has a major impact on its efficiency and the level at which prices are set. In effect, if the consumer knows what products and services are available on the market and their cost, he can secure what he needs at the price that suits him. Enlightened decisions thus made by consumers then enable producers to adjust their output and prices in terms of real consumer needs. The result is better use of resources and better knowledge of needs.

These economic concepts, elementary though they may be, are nonetheless the source of a significant movement of protest which has appeared in a number of countries with respect to the major restrictions placed on advertising in the sector of the professions. The *Office* considers it worthwhile to examine the meaning and scope of the movement before dwelling on the advertising restrictions in this sector in Québec and proposing the necessary remedies.

1. Protest movement respecting restrictions on advertising by professionals

In a number of countries, the amount of information available on the professional services market is now very limited because of the many restrictions placed on advertising by professional associations or state agencies entrusted with regulating the professions. Contrary to other categories of producers, which generally can advertise as much as they wish, except where prohibited, professionals find they are forbidden any advertising except where expressly authorized by these associations or agencies.

Generally speaking, the advertising allowed professionals is restricted essentially to certain information regarding professional practice, circulation of which is very limited. The whole body of restrictions has recently given rise to vigorous protest on the part of government agencies, consumers' associations and certain professionals themselves, particularly in the United Kingdom, the United States and Canada.

(a) United Kingdom

In the United Kingdom, the members of the Monopolies Commission, charged with studying the effects of certain restrictive practices that existed in the sector of professional services, concluded in 1970 that, as a general rule, the restrictions placed on advertising by professionals acted against the public interest. However, while admitting it was not in a position to tell whether these conclusions applied necessarily to every professional, the commissioners recommended to the British Government that special inquiries be conducted among the professions for which such restrictions were in force.[267]

A few years later, the government gave effect to this recommendation and entrusted the same Commission with a mandate to examine the effects of advertising restrictions in each of the following four professions: accountancy, law, veterinary medicine and securities brokerage. According to the conclusions of the Commission, published in the summer of 1976 in seven reports, four of which concern the legal profession alone,[268] restrictions on advertising run counter to the public interest.[269] In its report on accountancy the Commission had this to say:

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[267] Supra, note 87, pp. 84-88.

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[268] For the legal profession, see: Services of Solicitors in England and Wales, A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising, House of Commons Paper 557; Services of Solicitors in Scotland, A Report on the Supply of Services of Solicitors in Scotland in Relation to Restrictions on Advertising, House of Commons Paper 558; Barristers' Services, A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising, House of Commons Paper 559; Advocates' Services, A Report on the Supply of Advocates' Services in Relation to Restrictions on Advertising, House of Commons Paper 560.
Reports on the other three professions were as follows: Accountancy Services, A Report on the Supply of Accountancy Services in Relation to Restrictions on Advertising, Cmnd. 6573; Stockbrokers' Services, A Report on the Supply of Stockbrokers' Services in Relation to Restrictions on Advertising, Cmnd. 6571; Veterinary Services, A Report on the Supply of Veterinary Services in Relation to Restrictions on Advertising, Cmnd. 6572. All these reports were published in July and August of 1976, by Her Majesty's Stationery Office in London.

[269] Except with respect to the services rendered by advocates and barristers; in general, these members of the legal profession have no direct link with the public because their services are engaged by the solicitors, who are in contact with the public. Therefore the Commission considered that restrictions on advertising did not run counter to the public interest in their case.

> The "conditions" which we have found to prevail (paragraph 96) operate and may be expected to operate against the public interest because the restrictions on advertising by virtue of which those conditions prevail:
> (i) unduly restrict the information given to the public about the services offered by individual accountancy practices (paragraph 121);
> (ii) are likely to have disadvantageous effects on the competitiveness and efficiency of the profession generally, on the introduction of innovatory methods and services, and on the setting up of new practices (paragraph 128); and
> (iii) may enhance the influence upon the public of other, less desirable, methods of attracting custom and tend to create a false image of the profession which is harmful to public confidence and to relations between the profession and the public (paragraph 131).[270]

In this report, as in those dealing with the other professions,[271] the Commission recommended that the existing general rule prohibiting all advertising except where explicitly authorized be reversed, and that from then on all advertising be allowed unless it derogated from certain general principles to be expressly stipulated. Thus, according to the Commission, an accountant should be able to advertise as much as he wished, whatever the content and manner of distribution, provided he respected the following rules:

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[270] Supra, note 268, pp. 57-58.

[271] Except in the report on advocates and barristers; see note 269 above.

> (1) No advertisement, circular or other form of publicity used by an accountancy practice should claim for that practice superiority in any respect over any or all other accountancy practices.
>
> (2) Such publicity should not contain any inaccuracies.
>
> (3) While advertisements, circulars and other publicity may make clear the intention of the accountancy practice to seek custom, they should not be of a character that could reasonably be regarded as likely to bring the profession into disrepute.[272]

These recommendations are now under discussion between the British Government and the professional associations concerned, and everything suggests that they should be accepted and implemented.[273]

(b) United States

In the United States, the restrictive measures adopted regarding advertising by professional associations and state agencies entrustec with regulating the professions have given rise to a number of actions, particularly in the fields of law, pharmacy, medicine, and dentistry.

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[272] *Supra*, note 268, p. 59.

[273] This at least is what is suggested by Robert Bertrand, Assistant Deputy Minister of the Federal Department of Consumer and Corporate Affairs and Director of the Bureau of Competition Policy, in a paper delivered to the Canadian Bar Association, British Columbia Section, *supra*, pp.15 -16, note 93.

In the field of law, the protest movement seems to go back to February 1975, with the proceedings instituted by the Consumers Union of United States and the Virginia Citizens Consumer Council against the Virginia State Bar, the Supreme Court of Virginia and the American Bar Association.[274] The Consumers Union, which wished to publish a directory with information concerning the various legal services offered to the public, could not carry out its project because the lawyers of the State of Virginia could not, on pain of disciplinary action, provide certain of the information asked of them, such as their office consultation hours and their fees.

In support of their action, the two consumers' associations alleged that the restrictions in question constituted a denial of the public's right to information and thus violated the American Constitution. Charged with hearing the case, the District Court for the Eastern District of Virginia decreed in December 1976 that the provisions in the Code of Professional Responsibility of the Bar, adopted by the Supreme Court of Virginia, that limited the advertising lawyers were permitted, were in fact a violation of the freedom of expression guaranteed by the Constitution. However, the judges were divided on the question of whether information regarding fees ought to be permitted.[275]

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[274] Regarding this action, see Barbara A. Stein, "Is Professional Advertising Unprofessional?" (1976) 12 Trial, No. 6, 26, p. 27; H. Blair White, "Advertising Lawsuits and F.T.C. Investigation Are Pending", (1976) 62 American Bar Association Journal, p. 1567.

The decision handed down in June 1975 by the Supreme Court of the United States in the famous case of Goldfarb v. Virginia State Bar[276] was to provide considerable impetus to this protest movement.[277] In fact, this judgment, which it will be recalled dealt with the validity of the minimum fee schedule suggested by the Virginia Bar, established among other points that the specific nature of an activity was not in itself sufficient to exempt it from the antitrust legislation of the United States. It thus made it possible to eliminate one of the major obstacles to instituting proceedings against certain practices that restrict competition in the legal field and other professions.

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[275] Consumers Union of United States, Inc., et al. v. American Bar Association, et al., District Court for the Eastern District of Virginia, Richmond Division, Civil Action No. 75 - 0105 - R, December 17, 1976, Merhige, Warringer and Bryan, JJ. On this decision see "The Advertising Issue", (1977) 63 American Bar Association Journal, pp. 242-243.

[276] Supra, note 191.

[277] The same sort of boost was provided by another decision handed down by the Supreme Court the same day, Bigelow v. Commonwealth of Virginia, (1975) 95 S. Ct., 2222. Although this decision did not deal with the question of advertising by professionals, it was important because it affirmed that freedom of expression does not cease to be guaranteed by the American Constitution simply because it takes the form of commercial advertising.

In the months that followed this decision, many actions intended to have advertising restrictions declared illegal were instituted by lawyers, particularly in the States of New York, Virginia and Wisconsin, and by consumers' associations in the State of California.[278] In general the authors of these actions emphasized that restrictions on advertising were unconstitutional on the grounds of freedom of expression and violated the antitrust laws of the country.

The decision of the Supreme Court of the United States in the Goldfarb case, also had repercussions within the American Bar Association. In fact, the President, a few days after it was handed down, asked the Standing Committee on Ethics and Professional Responsibility of the Association to undertake a thorough study of the Code of Professional Responsibility in the light of the case.[279]

Following public hearings held in October and November 1975 with lawyers, law associations and socio-economic groups, the committee prepared for discussion a draft which could eventually replace the provisions in the Code of Professional Responsibility respecting advertising. Like the Monopolies Commission in the United Kingdom[280], the committee proposed that the prohibition against advertising be abolished and that lawyers be allowed to advertise as much as they wished as long as they did not do so in a false or misleading manner.[281]

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[278] See William B. Smith, "Making the Availability of Legal Services Better Known", (1976) 62 American Bar Association Journal, 855, pp. 856-857; Barbara A. Stein, supra, note 274, p. 31.

[279] See Lawrence E. Walsh, "President's Page", (1976) 62 American Bar Association Journal, p. 405.

The changes made by the American Bar Association in the Code of Professional Responsibility, at its semi-annual congress held in Philadelphia in February 1976, were not however as extensive as those proposed in the draft submitted by the Standing Committee on Ethics and Professional Responsibility, since the existing general prohibition against advertising was retained.[282] Nevertheless significant changes were made: the lawyer may now mention in the telephone directory or other directories approved by the Association, the fee he charges for an initial consultation, and clients may obtain on request a list of the fees he charges or an estimate of the cost of certain specific services and learn whether or not he accepts credit cards or other terms of payment.[283]

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[280] See pages 220-221 above.

[281] See "Legal Profession Is Considering Code Amendments to Permit Restricted Advertising by Lawyers", (1976) 62 American Bar Association Journal, pp. 53-54.

[282] After submitting its draft to the persons concerned in the autumn of 1975, the committee received many comments which suggested the wisdom of an exhaustive study of the subject before submitting its final report. Thus, at the conference in February 1976, the committee restricted its proposals to less extensive amendments. Certain of the proposals were intended to permit lawyers (1) to furnish information for the directories prepared by consumers' organizations (2) to state on their professional cards or in the telephone directory the activity sectors on which they concentrated or to which they restricted their practice. These proposals were rejected. Those that were finally accepted were submitted by another committee, the Committee on Professional Discipline. See American Bar Association Journal, ibidem; "Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages", (1976) 62 American Bar Association Journal, pp. 309-310; William B. Smith, supra, note 278, pp. 858-861.

Although these changes appeared acceptable to the participants in the congress, they certainly did not satisfy the Federal Justice Department of the United States. In fact, in June 1976, it instituted proceedings against the American Bar Association, alleging that the Code of Professional Responsibility of the Association contained illegal provisions because it forbade lawyers to advertise the availability of their services and their fees. According to the Department, these restrictions deprived consumers of relevant information respecting the cost and availability of services and prevented them from taking advantage of effective price competition.[284] The case is now pending before the District Court for the Northern

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[283] See "American Bar Association Amendments to Canon 2 of the Code of Professional Responsibility Approved by the House of Delegates", February 17, 1976. For further details concerning amendments to the initial text, see Charles A. Hobbs, "Lawyer Advertising: a Good Beginning but Not Enough", (1976) 62 American Bar Association Journal, p. 735.

[284] See "Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws", (1976) 62 American Bar Association Journal, 979; H. Blair White, note 274, p. 1567.

District of Illinois.[285]

The Federal Justice Department also intervened in December 1976 in a case in which lawyers Bates and O'Steen opposed the State Bar of Arizona, stating among other points that the almost complete prohibition against advertising by lawyers ran counter to the freedom of expression guaranteed by the American Constitution.[286]

In this case,[287] the two lawyers, who had had disciplinary action taken against them by the State Bar of Arizona because they advertised in a newspaper their fees for various types of services (divorce, adoption, bankruptcy, change of name), contested the action, maintaining that the provisions respecting advertising in the Code of Professional Responsibility adopted by the Supreme Court of the State were unconstitutional and also violated the antitrust legislation of Arizona and the United States. When their case was dismissed in July 1976 by a majority decision of the Supreme Court of Arizona,[288] they appealed from the judgment to the Supreme Court of the United States. The judgment to be handed down by the latter body in the summer of 1977 will certainly have a determining effect on litigation bearing on the same subject, both for lawyers and for other professionals.

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[285] Concurrently with this action by the Federal Justice Department, in the spring of 1976 the Federal Trade Commission undertook an inquiry into the whole matter of legal services, particularly aspects such as advertising and specialties: See H. Blair White, idem, pp. 1567-1568.

[286] See "The Advertising Issue", supra, note 275, p. 242; "To Advertise or Not to Advertise", (1977) 63 American Bar Association Journal, 340, p. 345.

[287] See "Supreme Court Will Hear Lawyers' Advertising Case from Arizona", (1976) 62 American Bar Association Journal, 1422; H. Blair White, supra, p. 1568; "To Advertise or Not to Advertise", idem, pp. 341-345.

In the field of pharmacy, many actions have been instituted against the state agencies entrusted with regulating the profession. In 1976, for instance, the Virginia State Board of Pharmacy was taken to court by the Virginia Citizens Consumer Council for adopting provisions according to which it was demeaning to the professional dignity of a pharmacist to advertise the prices of prescription drugs.

The decision rendered in this case by the District Court for the Eastern District of Virginia was upheld by the Supreme Court of the United States.[289] In the judgment of the court, the contested provisions violated the right of every citizen to freedom of expression and could not be justified by the State's determination to preserve the professional character of pharmacists' activities. Similar actions were instituted against other state agencies, specifically in Florida, Pennsylvania and Maryland, and led to the repeal of provisions forbidding pharmacists to advertise drug prices.[290]

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[288] In the Matter of Members of the State Bar of Arizona, J.R. Bates and Van O'Steen, (1976) 555 P. 2d, 640.

[289] See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, (1976) 96 S.CT., 1817. On this decision, see "Advertising Receives Standing", (1976) 62 American Bar Association Journal, 892.

In the fields of medicine and dentistry, complaints were lodged by the Federal Trade Commission against, specifically, the American Medical Association in 1975[291] and the American Dental Association in 1977.[292] In these suits, the Commission maintained that the associations in question had adopted provisions to prevent their members from advertising and competing with respect to fees.[293] As in the action taken by the Federal Justice Department against the American Bar Association, the Commission expressed the opinion that these provisions had the effect of preventing the fees for services offered from being established freely, thus reducing competition and depriving consumers of information relevant to the choice of a physician or dentist. These cases are now pending. Furthermore, in November 1976, the District Court for the Eastern District of Virginia judged that a Virginia statute forbidding physicians to advertise their professional services, fees and credit facilities violated the freedom of expression guaranteed by the American Constitution.[294]

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[290] Idem, p. 1822. In Québec a draft regulation respecting advertising proposed by the Order of Pharmacists was the topic of considerable discussion when public hearings were held by the *Office* in the autumn of 1974. Following these hearings, many changes were made in the draft which was finally approved by the Lieutenant-Governor in Council on July 31, 1975 and came into force on November 1. For further details, see note 211 above, and note 331 below.

[291] United States of America before Federal Trade Commission, in the Matter of The American Medical Association, a corporation, The Connecticut State Medical Society, a corporation, The New Haven County Medical Association, Inc., Docket No. 9064, December 19, 1975.

[292] United States of America before Federal Trade Commission, in the Matter of American Dental Association, a corporation, Indiana Dental Association, a corporation, Indianapolis District Dental Society, a corporation, Virginia Dental Association, a corporation, and Northern Virginia Dental Society, a corporation, Docket No. 9093, January 4, 1977.

This protest movement against advertising restrictions, which in the United States involves lawyers, pharmacists, physicians and dentists in particular, seem about to be extended to other professions.

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[293] It must be stressed that in contrast with Québec, the services of physicians in private practice in the United States are not assured under a universal public plan such as our health insurance. Therefore most consumers must assume directly the cost of the services offered by the doctors.

[294] Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine, (1976) 424 F. Supp. 267.

In fact, the Federal Trade Commission announced near the end of 1975 its intention to attempt to do away with the restrictions placed on advertising by optometrists, opticians, engineers and veterinarians.[295]

(c) Canada

As far as the *Office* is aware, the restrictions placed on advertising by the professional associations in Canada have not given rise to any court action to date. This situation is largely explained by the fact that application of the Combines Investigation Act was not extended to the professional services sector until certain provisions of Bill C-2 were enacted; these came into force, as it may be recalled, on July 1, 1976.[296] However, since then the restrictions have attracted the attention of a number of persons, in particular, economists, officials entrusted with application of the Combines Investigation Act and representatives of the Consumers' Association of Canada.

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[295] See William B. Smith, supra, note 278, p. 857. It should also be noted that with respect to the optometrists and opticians a District Court of the State of California declared in January 1976 that the restrictions imposed on advertising the prices of optical prostheses and the places where they were sold constituted a restriction of the freedom of expression guaranteed by the American Constitution: Terminal-Hudson Electronics v. Department of Consumers Affairs, (1976) 407 F. Supp., 1075.

[296] Supra, note 40 and pages 185-194.

At the conference entitled The Professions and Public Policy held in Toronto in October 1976, Sylvia Ostry, Deputy Minister with the Federal Department of Consumer and Corporate Affairs, declared that in a number of cases the advertising restrictions in the field of the professions went against the public interest:

> The approach in Bill C-2 reflects this view and our general concern that, in many cases, restrictions on advertising are incompatible with their relative costs and benefits to the public.
> . . . The restrictions on price-cutting along with most restrictions on advertising are undesirable of course from the point of view of consumers; one might expect that they are also fairly disagreeable to new entrants to the profession who, by being denied the opportunity to use these competitive devices, are put at a significant disadvantage.[297]

At the same conference, economics professors Lee and Alexandra Benham stressed the difficulties now encountered by the consumer in obtainin information on professional services. They considered that professionals "very frequently make every effort to see that consumer remain uninformed as to the important alternatives available and as to the differential nature of the services offered by members of their profession", and stated that abolition of the present restrictions on advertising would add considerably to the information available to the consumer and would also be of benefit to professiona who are efficient, creative or wish to offer their services at lower rates.[298]

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[297] Supra, note 94, pp. 19 and 21.

Another participant in the conference, Professor Gordon E. Kaiser of the Law Faculty of the University of Toronto, stated that he was also in favour of the abolition of advertising restrictions in the professional sector. Even if, in his opinion, the resulting economic consequences were not considerable, such restrictions should still be abolished because they violated basic principles of freedom of information.[299]

Representatives of the Competition Policy Bureau of the Federal Department of Consumer and Corporate Affairs have been attempting for the past year to explain to professional associations the effects of Bill C-2, particularly with respect to restrictions on advertising. In a paper delivered to the Lawyers' Club of Toronto, on April 8, 1976, W.P. McKeown, then Deputy Director of the Bureau, stated that the restrictions placed on advertising by these groups to date were too general; therefore they could be investigated under section 32 of the Combines Investigation Act in spite of the exemption enjoyed by regulated activities such as professions.[300] He also expressed the opinion that informative, responsible advertising should be authorized, and one day would be.[301]

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[298] "Reaction by Lee Benham and Alexandra Benham to Speech by Dr. Sylvia Ostry on Competition Policy and the Self-Regulating Professions", paper delivered at the conference on The Professions and Public Policy, Toronto, October 16, 1976, pp. 7-8.

[299] Supra, note 234, pp. 27-28.

In the same spirit, Robert J. Bertrand, Assistant Deputy Minister with the Department of Consumer and Corporate Affairs and Director of the Bureau of Competition Policy, stated in a speech given in British Columbia in January 1977 that, in his opinion, the powers granted by the State to the legal profession for the purpose of protecting the public did not give it the right to place an almost total ban on advertising. He also mentioned that, although he did not consider the abolition of advertising restrictions a panacea, he did see it as an effective means of encouraging competition among the members of the profession.[302]

Advertising restrictions imposed on lawyers have also aroused reaction on the part of the Consumers' Association of Canada. In fact, during an interview in Vancouver at the beginning of 1977, the President of the Association, Mrs. Ruth Lotzkar, stated that most Canadians had difficulty in making objective decisions regarding legal services. In her opinion, lawyers should be able to advertise their spheres of activity and their fees. This would enable the consumer to make more rational decisions and introduce into the market an element of price competition for services.[303]

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[300] See pages 188-189 above.

[301] See page 14 of the paper.

[302] *Supra*, note 93, pp. 9-10.

This review of the protest movement in various countries against advertising restrictions imposed on professionals has enabled the *Office* to take note of the principal arguments on which the movement is based: these restrictions violate the citizen's right to freedom of expression, that is, the right to transmit and receive information, and constitute an obstacle to establishing a truly competitive market that can be of benefit to both consumers and producers of professional services.

The *Office* believes that such arguments are in general equally valid for Québec.[304] However, it considers that the remedies viewed as essential must be properly adapted to the situation as it exists.

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[303] See "C.A.C. Claims Publicity Ban Causes Consumer Confusion", (1977) 4 National (Journal of the Canadian Bar Association), No. 2, p. 12. It should also be stressed that at the beginning of June 1977, at the end of the joint annual meeting of the members of the Alberta and British Columbia sections of the Canadian Bar Association, where committee discussion dealt specifically with the question of advertising by lawyers, the President of the Association announced there would be a national symposium on the question in November 1977, which would be sponsored jointly by the Association and the Federation of Law Societies.

[304] Moreover, it is interesting to note that the Charter of human rights and freedoms, S.Q. 1975, c. 6, expressly recognizes that citizens have the right to freedom of expression (s. 3) and freedom of information (s. 44).

Thus, it deems it necessary to examine the nature and effects of the advertising restrictions now imposed on professionals in Québec before proposing the measures that seem appropriate to provide fuller information to consumers of professional services.

2. Existing advertising restrictions for professionals in Québec and remedies essential to increasing information to consumers

Although the question of the publicity allowed professionals has not given rise to much discussion by the Québec public,[305] the fact nevertheless remains that advertising restrictions much the same as those existing in the countries we have just reviewed have also been established by the professional corporations. The Professional Code has moreover confirmed this situation by obliging the corporations to "determine, by regulation, what a professional may include in his public advertisements and under what conditions he may advertise".[306]

Since the enactment of the Code, the regulations governing advertising passed by the professional corporations and approved by the Lieutenant-Governor in Council on the recommendation of the *Office* have made very few changes in the highly restrictive rules established in the past. Firmly rooted in the long tradition that exists in this field, these regulations maintain the general rule prohibiting all advertising except where expressly authorized. In fact, the information a professional may provide in his advertising is generally restricted to the following:

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[305] The only discussion of any importance that could be mentioned took place in 1974 with regard to a draft regulation respecting advertising of the Order of Pharmacists. For further details on this question, see note 290 above and note 331 below. This question of the publicity permissible for professionals has been raised a number of times by the *Office* during the public consultations that preceded this report.

[306] Supra, note 1, section 90.

- his name, and those of his partners and the professionals he employs,
- his profession,
- his membership in another professional corporation,
- the title of his diplomas,
- his office address, telephone number and office hours,
- the graphic symbol of the corporation or corporations he belongs to,
- the name and graphic symbol of his employer,
- the title of his position,
- his specialist's certificate if he has one that is recognized by the corporation.[307]

The professional must generally limit his advertising to the written medium, i.e. his professional card, letterhead, office signs, journals, reviews, directories and other printed matter.

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[307] At the present time, the specialist's certificate is mentioned by very few professionals since only two corporations of the 38 issue specialists' certificates; these are the Professional Corporation of Physicians and the Order of Dentists. However, the Order of Veterinary Surgeons and the Order of Chemists have recently submitted to the *Office* draft regulations intended to establish such certificates. These drafts are now being studied.

In the view of the *Office*, the information professionals may give in their advertising is not really much help to the consumer in choosing a professional. In fact, even if such information does enable him to know of the existence of a professional, to know where and when to meet him, to know whether he is a member of another professional corporation, if he has particular diplomas, it does not give him a sufficient basis for comparison to enable him with full knowledge of the matter to exercise his right to call on one professional rather than another; it does not answer the basic concerns of the consumer at the time he selects a professional because he usually wishes to know those who actually offer the service he needs and, among them, the person who can render it at a cost that suits him.

The *Office* has observed that the present regulations have the effect of placing all the members of a corporation on almost the same footing vis-à-vis their potential clients. However, although it is true that they have several points in common, such as the fact of having the same basic competence, of being subject to committees on discipline and professional inspection, of having to respect the same regulations and the same quality requirements, etc., the similarity between members of a corporation nevertheless stops at these characteristics which must be ensured and verified by the corporations. Many factors in fact distinguish professionals in their practice - this being general for some and specialized for others - in their working methods and in the organization of their offices, to mention only a few points. Since these factors have a major influence on the nature of the services offered by each professional as well as their cost, the public should have the right to know them and be in a position to compare professionals and select the one that best suits him.

Under the present regulations, professionals generally cannot circulate information regarding the activity sectors in which they practise or the fees for the services they render. The *Office* considers that these restrictions, because they do not make possible the distribution of comparative information on essential points, are clearly detrimental to the consumer in his relations with the professional. In effect, the lack of such information reduces his power of negotiation considerably and places him in an inferior position vis-à-vis the professional he consults. Moreover, such a situation strongly curbs any incentive on the part of professionals to engage in healthy competition with each other and therefore is not conducive to the introduction of more efficient working methods that are less costly or services that are better adapted to consumer needs.

The *Office* has concluded that the present situation must be remedied. Therefore it is proposing certain measures designed to provide fuller information to consumers regarding activity sectors in which professionals practise and fees for professional services. First, however, it believes it necessary to insist on the fact that the dissemination of certain information must continue to be prohibited.

(a) Need to prohibit dissemination of information regarding the quality of professional services

Although it is convinced of the necessity of permitting professionals to provide more information, the *Office* is aware that the step must be taken with care. It believes in fact that the present rules regarding the advertising permitted professionals must be changed only to the extent that the consumer's situation will thereby be improved.

Thus the *Office* is anxious to stress from the outset that in its opinion the dissemination of information regarding the quality of professional services should continue to be prohibited. The *Office* considers that such information, dealing with either the characteristics of the service itself or the value of the professional who renders it, would not be beneficial to the consumer because of the difficulties of appreciation implied.

On the one hand, information supplied by a professional about the technical characteristics of the services he renders, such as the number and type of acts involved, can scarcely be of benefit to the consumer since he generally lacks the objective criteria to enable him to judge whether the technical definition given by the professional of his own services includes sufficient or too many elements to meet his needs adequately and whether this definition corresponds to current practice in the profession. Distribution of such information, then, will not necessarily assist the consumer in making his choice; it is rather more likely to induce him to call upon services that are more complex than he really needs.

Information regarding the benefits the consumer may reap by using a service presents the same difficulty of assessment by the consumer. Moreover, considering the especially subjective nature of the information, again the risk is high that the consumer will be induced to demand services he does not really need.

On the other hand, publicity dealing with the value of the professional who offers the service, intended to emphasize the promptness, courtesy, interest and seriousness with which he renders it, the satisfaction previous clients have had or his superiority over other professionals, should not be authorized.

Of course, publicity of this kind could be useful for the consumer if it were possible to verify its content objectively and rigorously. However, this is clearly impossible. This type of information reflects the appreciation the professional makes of his own services and, with regard to this purely subjective appreciation, neither the consumer nor the professional corporation can verify whether in each case the quality of the service rendered corresponds in every particular to the quality advertised. Such a situation is certainly more likely to promote the interests of professionals than those of consumers.

In short, in the opinion of the *Office*, such information might be of some slight use to the consumer, but it would certainly not compensate sufficiently for the numerous risks incurred, such as having services rendered that do not meet his needs in a satisfactory manner, or being persuaded to ask for services he does not really need.

The *Office* is aware that maintenance of the restriction on advertising of the quality of professional services is not conducive to the consumer's acquiring greater autonomy in the appreciation of this quality. However, it does not follow that he must renounce all responsibility in this respect and passively rely entirely on the professional corporations, which have a duty to assure such quality.

On the contrary, he should, as an individual or as a member of a consumer association, take a greater interest in the control mechanisms established by the professional corporations and in particular in the regulations that can have an effect on the quality of professional services, drafts of which must be published in the Québec Official Gazette before they are approved by the government. The *Office* maintains that it is essential for the users of professional services to be able to express their point of view and suggest the changes they consider necessary before these regulations are adopted.

Concurrently with this consumer task, the *Office* hopes that the professional corporations will make better known to the public their mechanisms for ensuring the quality of services. Thus, the corporations could make available to the public the principal regulations in this area, codes of ethics, for instance. Such a measure would no doubt enable consumers to exercise greater vigilance vis-à-vis professionals.

Although the *Office* feels the need to retain the prohibition against disseminating information on the quality of professional services, it believes that professionals must be able to transmit to the public certain information of a more objective nature which is really useful to the consumer, such as the activity sectors in which they practise and the fees for their services.

(b) Consumer's need for information about professionals' activity sectors

For the professional services market to function efficiently, it is important among other things that the consumer be in a position to call upon the professionals most likely to satisfy his needs. For some years now, the members of certain professions have come to concentrate their practice in one or more specific activity sectors; they have thus become more experienced and more proficient in these areas and more interested in offering certain services than other professionals who render these services only occasionally.

Obviously in such cases if the consumer knew the activity sectors in which the professionals concentrate their practice, he could find those whose services best meet his needs more easily and quickly. Conversely, if the professional could make known to the public the sector or sectors in which his principal practice is concentrated, it would be easier for him to find the clientele he wants and put to good use the experience he has acquired in the sector or sectors.

Because it is conducive to greater satisfaction of consumer needs and better use of resources, the *Office* believes that information regarding professionals' activity sectors should be available in the field of professional services. Access to this information would be of benefit to both consumers and producers of professional services. Specialist certificates which may be instituted under the Professional Code might be considered to be a means to this end. The Code in fact enables most professional corporations to define by regulation "the different classes of specialization within the profession" it governs.[308] The requirements for issue of these certificates by the corporation are established in the same fashion as those for issuing permits. Thus, the Lieutenant-Governor in Council recognizes the diplomas leading to them[309] and the corporation establishes regulations governing diploma or training equivalences where applicable.[310] It may also stipulate other requirements such as a professional examination or practicum for those who have a recognized diploma or equivalence.[311]

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[308] Supra, note 1, s. 92 (e). However, some of the acts establishing the professional corporations with exclusive rights to practise stipulate that the members of these corporations are not authorized to call themselves specialists or indicate a particular training or specialty; see the Denturologists Act, S.Q. 1973, c. 50, s. 12; Pharmacy Act, S.Q. 1973, c. 51, s. 26; Optometrists Act, S.Q. 1973, c. 52, s. 24; Dispensing Opticians Act, S.Q. 1973, c. 53, s. 14; Hearing-aid Acousticians Act, S.Q. 1973, c. 54, s. 12; Podiatrists Act, S.Q. 1973, c. 55, s. 15; Chiropractic Act, S.Q. 1973, c. 56, s. 12.

[309] Idem, s. 178(a). In the two professions which have such certificates, see supra, note 307, the Québec diplomas leading to specialist certificates are the same as those required for a permit.

[310] Idem, s. 92(f) and (g).

The object of these specialist certificates is to ensure that the professionals practising a specialty have the necessary competence and to reserve the corresponding title exclusively for them.[312] It is therefore logical that the mechanism should involve the application by the professional corporation and the government of a system of controls as elaborate as that governing the issue of permits to members of a professional corporation.[313]

Given the nature of its goals and the complex control process involved, the use of specialist certificates to ensure that the public can identify the activity sectors in which professionals are engaged hardly seems appropriate. The *Office* thinks there is a much simpler means of achieving this: amendment of corporation regulations respecting advertising so as to explicitly authorize professionals to inform the public of the sector or sectors on which they concentrate or to which they confine their practice.

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[311] Idem, s. 92(i).

[312] The exclusivity of titles recognized by specialist certificates is sanctioned by section 57 of the Professional Code: "No person may use the title of specialist or act in such a way as to lead to the belief that he is a specialist unless he holds an appropriate specialist's certificate."

[313] For a description of the mechanisms governing the issue of permits, see above, pages 207-210.

To be useful to the consumer, however, the *Office* believes that this authorization ought to be controlled by specific norms established in the regulations respecting advertising; the professional must not be free to draw up his own list of activity sectors and decide himself what experience he must have in the sector to mention it in the information he gives the public.

Thus, the corporation must first establish in its regulation respecting advertising an exhaustive list of the activity sectors professionals are authorized to mention in their publicity. Moreover, for each such sector, the corporation must determine in its regulation the professional requirements, the number of years or months of practice and the type of experience, for a member to be permitted to mention the sector in his publicity.

However, mention of his experience in a given activity sector is not to signify, as does the specialist certificate, that the professional holds a title of competence in this sector. The professional corporations should include in their regulations respecting advertising a provision obliging professionals to mention their activity sectors in a manner that is sufficiently clear - for example, by preceding their identification by the reference "principal activity sector" - so that the consumer can perceive the fundamental difference between this and a specialist's certificate.

Because the mechanism proposed by the *Office* to make known to the public the activity sectors of professionals depends essentially on their experience and interest in these sectors, it is more flexible than that of specialist certificates. It should enable a large number of professionals to state the type of practice they usually engage in and, as a result, promote a better orientation of consumers on the professional service market. In this regard, the mechanism has other advantages over specialist certificates, since it will enable professionals to adjust their practice gradually to the needs of the market and inform the public of this, without necessarily having to enter an organized training program.

This type of consumer information should, in the opinion of the *Office*, be supplemented by distribution of information on the part of the professional corporations themselves. It is in effect important for them to make known to the public the various activity sectors that their regulations authorize them to advertise and explain the principal types of services offered in each sector. These additional particulars will make the information provided by the professionals about their principal activities even more beneficial to consumers.

The *Office* is aware that the series of measures it is recommending with respect to the manner in which professionals should make known to the public their activity sector is not applicable at the present time to all professional corporations.[314] However, it seems that implementation of such measures would now be of advantage to the consumer in a certain number of professions.[315] However, it is difficult in a general report such as this, to determine each of these professions.

The *Office* is planning instead special discussions with the corporations that have some of their members in private practice. It hopes that the professional corporations will agree to amend their regulations respecting advertising to cover identifiable activity sectors about which the consumer needs information. However, if they were to refuse or fail to do so, the *Office* could use the suppletory power it already has, which enables it to amend the regulations.[316]

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[314] For example, in the case of the two professional corporations which now issue specialist certificates, physicians and dentists, the *Office* thinks the authorization to mention activity sectors could be a source of confusion for the public.

[315] A few corporations have already taken the initiative of acting to this effect. Thus the Order of Engineers, in its Regulation respecting advertising, Québec Official Gazette, Part 2, March 24, 1976, p. 2199, authorizes any engineer to mention in his advertising "the field of engineering in which he principally practises his profession". This corporation holds a special regulatory power that enables it "to regulate the use of the titles or qualifications under which its members may offer or render their services": Engineers Act, R.S.Q. 1964, c. 262, s. 10(m). Moreover, the Professional Corporation of Dieticians, in its draft Regulation respecting advertising, Québec Official Gazette, Part 2, May 25, 1977, p. 2477, plans to permit its members to indicate in their publicity their "main field of activities among the following: clinical dietician, administrative dietician, community dietician, consultant dietician, teaching dietician, research dietician".

At the present time, however, the *Office* can see at least one profession about which such information appears necessary, and possible in the short term; that is, the lawyers. In this profession, in Québec and elsewhere the whole question has attracted wide notice for the past few years.[317]

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[316] Supra, note 1, s. 12 (k), (l), (q) and (r).

[317] In Ontario, for example, according to a communiqué issued on the subject on June 25, 1976, Ruling 24 of the Professional Conduct Handbook of the Law Society of Upper Canada "permits a member who has restricted his practice to a certain branch of law to include this fact in announcements respecting his practice and on his professional card". See The Law Society of Upper Canada, Communiqué Number 55, Osgoode Hall, Toronto. According to the same communiqué, it seems that lawyers limiting their practice to a specific branch of law could also mention this on their letterhead, following approval by the Professional Conduct Committee. See Victor P. Alboini, "Advertising a Lawyer's Limited Practice", (1977) 4 National (Canadian Bar Association Journal), No. 2, 10, and "A Lawyer's Limited Practice in Ontario - The Time for More Appropriate Recognition", (1976) X The Law Society Gazette, 154.
For some time in the United States, the Code of Professional Responsibility of the American Bar Association, subject to the regulations of the state bars, has authorized lawyers and legal firms to mention in legal directories the branches of law in which their practice is concentrated. It should also be stressed that at the semi-annual congress of the Association held in February 1976, a proposal of the Committee on Ethics and Professional Responsibility was submitted to the delegates; it suggested considerable broadening of the means of advertising already permitted regarding activity sectors. The suggestion was set aside in favour of another more modest one which authorized mention of this information in the directories published by the various American bars and in telephone directories; this question is however to be discussed further. For the text of the proposed amendments and those finally adopted, see "Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages", supra, note 282.

In Québec, for example, the Committee on Advertising by Lawyers of the Canadian Bar Association Québec Branch submitted a report in the summer of 1976 in which it recognized that the general public does not know which lawyer to turn to and that it should be better informed as to the lawyers likely to accept an assignment.[318] With respect to the question of law fields, the Committee's position was as follows:

> As for the nature of services which he supplies, the Committee recommends that a lawyer may, if he has at least three years of practice, advertise the fields of law in which he concentrates his practice at (sic) the condition that he advertises, at the same time, the year on (sic) which he was called to the Bar.
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> The Committee recommends further that as long as the Bar has not set up a system for the issuance of specialist's certificates, no lawyer may have the right to describe himself as a specialist or an expert.[319]

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[318] "Rapport du comité sur la réclame publicitaire par les avocats" (1976) 8 Barreau '76, No. 7, pp. 18-19. (An English version appeared in The National, Vol. 4, No. 1, January 1977, pp. 10-11, entitled, "Legal Advertising, A Special Report".)

[319] Ibidem. The Canadian Bar Association, in its Code of Professional Conduct, supra, note 139, p. 52, also adopted a position in favour of lawyers' mentioning their activity sectors: "Limited advertising (as opposed to unregulated advertising) can be of much assistance to persons seeking legal services for example . . . (c) the use of name plates on law offices and the publication of professional cards and announcements, including where permissible a reference to the fact that a lawyer is an accredited specialist or that his practice is restricted to a particular field."

As may easily be observed, the various branches of law are well identified (matrimonial law, tax law, labour law, civil law, criminal law, administrative law, etc.). These sectors are already fairly well known to the public although it does not really have the means of knowing which lawyers concentrate their practice in them. Considering the particular case of this profession, the *Office* thinks that the Bar is in an excellent position to quickly take the action advocated by the *Office* to inform consumers better regarding the sectors in which its members practise. Therefore the *Office* recommends that the Bar amend its Regulation respecting advertising in order to authorize lawyers to mention these sectors in their advertising, in accordance with any conditions which may be stipulated in the regulation.

To choose a professional, a consumer needs to know not only which ones are the best qualified to render the service required but also which ones can provide the service at a fee that suits him. Therefore, the *Office* is now proposing certain measures intended to enable the consumer to obtain information on fees for professional services.

(c) Consumer's need of information about fees for professional services

Every consumer will recognize right away the importance of knowing in advance the prices of goods or services he wishes to procure. Knowledge of the prices of the various products available on the market enables him to know whether he is in a position to obtain them, to decide which he should choose, and to determine from whom he should purchase them. The user of professional services is not free from this type of concern. It is clear that he would benefit from knowing the various fees charged by professionals.

At the present time there is a remarkable lack of information on the professional services market regarding fees for services. This situation is the consequence of the spirit of the present regulations which are intended to prevent any form of price competition, since it is deemed to be harmful to quality and contrary to the dignity of the profession. This determination to avoid competition appears mainly in the prohibition, in the regulations respecting advertising of the professional corporations, against making known to the public the fees for their services.

Unfortunately, because they prevent competition, these regulations involve economic disadvantages for the public. As we noted in our examination of advertising restrictions in force in other countries,[320] they prevent the consumer public from benefiting from the advantages of competition and deprive it of its right to appropriate information.

Furthermore, the *Office* feels strongly that the spirit of these regulations has an unfavourable effect on the whole professional-client relationship by creating a climate in which many professionals are reticent about approaching the question of the amount of their fees with their clients. In fact, they seem to feel it inappropriate to discuss the financial aspects of a service, which, in their opinion, is not of a commercial nature.

The *Office* has been made aware of the question through the numerous complaints and requests for information it receives from the public. Many of them are in fact the result of a misunderstanding on the question of fees and could have been avoided if the consumer had been better informed by the professional. In the hope that it can change the attitude of professionals in this respect, the

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[320] See above, pages 217 ff.

Office has already taken the initiative of recommending that the professional corporations introduce into the new codes of ethics they must adopt under the Professional Code a provision requiring the professional to inform his client of the approximate cost to him of the service requested.

The prohibition against professionals' advertising their fees, the reticence many still show with regard to discussing them and the resulting climate create a situation which the *Office* feels is clearly not favourable to the consumer. It places him in a situation of inferiority to the professional he is consulting, since, knowing neither the fees charged nor those generally in force on the market, he does not feel in a position to discuss the question of fees with any assurance and, too frequently, dares not even approach it.

A consumer's decisions about procuring professional services cannot generally be made in the abstract; they depend on many factors, the fee for the service being surely one of the most important. In the opinion of the *Office*, professionals have a duty to take into consideration this concern of consumers and must accept the financial aspect inevitably connected with their services. Consequently, the *Office* believes that they should agree to give more information about the fees they charge for their services.

In addition to increasing client confidence in the professional, such an attitude would enhance the whole professional-client relationship. Moreover, the consumer would be more inclined to call upon a professional who did not hesitate to inform him on a point as essential as the cost of his services.

In a general manner, relations between the public and the profession as a whole might also improve if its members were permitted to inform the public of the fees for their services. It is hardly a secret that the public, while generally recognizing the competence of professionals, considers them to be economically privileged, particularly if they are in private practice, and does not hesitate to reproach them, rightly or wrongly, for their high fees. The major restrictions existing with respect to information on prices are certainly not likely to improve the situation. As stressed by the Monopolies Commission in its recent report on advertising restrictions in the accountancy profession in the United Kingdom, they "tend to create a false image of the profession which is harmful to public confidence and to relations between the profession and the public."[321]

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[321] Supra, note 268, p. 59, Accountancy Services.

The desire of the *Office* to provide fuller information concerning fees may be surprising at a time when in some circles the consequences of advertising are being deplored and plans are being made for greater control. However, the *Office* does not believe that it is going against the measures taken in these other sectors. In fact, while they tend to control misleading advertising or that intended to create new needs, the *Office* is attempting to give consumers information that is not available with regard to the professional services they require.

Thus, the measures proposed for informing consumers do not appear to be likely to be prejudicial in any way. The *Office* does not recommend that almost any form of advertising regarding prices be authorized, as is the case in most other sectors of the economy; rather it prefers to maintain the present rule governing advertising whereby all forms are prohibited except those expressly authorized, and use this rule specifically to allow only the distribution of information which is sufficiently objective and comparative to aid the consumer in his decision to call upon professional services and in the choice of a professional qualified to render them. Moreover, the existence of codes of ethics imposing both rules of general conduct and precise obligations on professionals[322] should guarantee that, given clear rules about the information permitted, the conduct of the professional can be controlled.

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[322] Professional Code, supra, note 1, s. 85, as amended by section 8 of the Act to amend the Professional Code and other legislative provisions, S.Q. 1975, c. 80.

Thus, considering the particular powers of the professional corporations and the *Office* to authorize dissemination of the information deemed appropriate and to regulate professional conduct in this respect, the *Office* is convinced that the measures proposed will be of real benefit to consumers without undermining the climate of respect and confidence between the professional and his client or the quality of the services. These measures should now be described, considering separately the type of information to be disclosed about fees and the manner in which it should be furnished to the public.

(i) The type of information authorized

The *Office* is aware that the services rendered by professionals and the method by which their fees are determined vary appreciably from one profession to another. Therefore, in this report it does not intend to establish in a specific manner for each corporation the type of price information professionals should be able to furnish to the public. In its opinion, this question should rather be discussed with each of the corporations.

However, at this time the *Office* can determine certain types of information which in a general manner could be of real interest to the consumer and should be brought to his attention. The *Office* believes that the members of most professional corporations should be able to publish the following type or types of information: the hourly rate or percentage they charge their clients, the price of certain fairly standard goods or services and the fact that they can supply a written estimate of the fees for their services on request.

Hourly rate. Publication by professionals of the hourly fee they charge clients would enable consumers to make a comparison of prices. If he has a better knowledge of the various going market rates, a consumer can know which professional charges the fee he is prepared to pay.

Of course, publication of this type of information does not necessarily enable the client to know the total cost of the service wanted, since he cannot always assess the number of hours the service will require. However, the fact that the professional is obliged to notify his client of the approximate fee for his services along with the fact that the consumer may inquire, of other clients who have already needed this service, the approximate number of hours required to solve his problem, makes him better able to estimate the total cost to him of the service desired. Also, the fact that the professional must disclose the approximate fee for his services may be an incentive not to exceed the amount he has determined.

Percentage charged. Certain professional fees are based on a percentage of an amount related to the rendering of the service (construction costs, amount of a contract, total of a claim, etc.). This unit for calculating professional fees has often been criticized. Thus, although discussion in the public consultations held by the *Office* did not cover the various units for calculating fees, the Consumers' Association of Canada (Québec) was anxious to recommend in its brief that fees based on percentages not be included in the schedules it might be asked to suggest to the government:

> Even if the complexity of a professional act and the level of competence required may be considered in certain cases to vary according to the monetary value of the problem concerned by the service, this argument in no way constitutes a rational basis on which to calculate the value of the services rendered. At most, it can be considered as a sound basis for assessing the burden the professional will have to assume as far as his professional responsibility is concerned. . . .
> After due reflexion, it may be concluded that the value of professional services has no direct bearing on the monetary value of the problems with which they deal.[323]

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[323] Supra, note 71, p. 15.

The *Office* does not intend to discuss these arguments in this report,[324] nevertheless it notes that when fees are based on percentages, if the amount to which they are applicable is known to the client it is possible for him to estimate precisely the amount he will have to pay.

During the future discussions between the professional corporations and the *Office* for the revision of the regulations respecting advertising, the advisability of allowing professionals to continue to use this unit of calculation will be considered in the light of the particular characteristics of each profession. If it can be shown that the fee based on percentage is not a disadvantage to the public, the *Office* does not see why professionals should not mention it in the information they provide to the public.

The price of fairly standard goods and services. The *Office* believes that professionals should be able to tell the public the price of certain goods and services that are sufficiently standardized to enable the consumer to make valid comparisons. It is of course possible to compare prices in the case of goods sold by the members of a few professions, such as medications[325], contact lenses, glasses, hearing-aids and various dental prostheses.[326] But it is also possible in the case of a number of services, for example, the initial consultation with members of a number of corporations, regular dental checkup, preparation of a marriage contract with customary gifts between future consorts, preparation and presentation of a petition for divorce that is not contested, vaccination of an animal.

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[324] See page 10 above.

[325] See note 331 below, for the reasons which induced the *Office* to recommend that the information on drug prices be limited.

However, the *Office* is aware that, although certain goods and services are relatively standard, comparison of prices may be difficult or even misleading if the professionals use different terms to define the same services or the same term to define different services. Therefore it believes that professional corporations should determine, in their regulations respecting advertising, not only which goods and services are sufficiently standard to be publicized but also the terms used to designate them.

Written estimate of fees for services. In order to enable the consumer to be informed of the fees for the greatest possible number of services, the *Office* considers that professionals should also be able to inform the public of the fact that they are prepared to furnish, on request, a written estimate of the fees for their services.

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[326] See above pages 180-183.

Such precise information would surely increase the chances of the consumer's obtaining the service he desires at the price which best suits him on the market. Moreover, when the service required involves a large number of acts, it will enable him to obtain cost particulars which would no doubt be difficult to procure in any other manner.[327]

Furthermore, the *Office* believes that, because the consumer should be able to obtain the service he needs at the market price most suitable to him, it is important that he be able not only to find the information necessary on the market, but also to be certain, once the service has been rendered, that the fees charged conform to the advertised rates and that the services billed correspond to those rendered.

The *Office* believes that professionals should be obliged, by provisions included in their codes of ethics, to furnish their clients with a detailed fee statement in which the consumer could check the principal elements used by the professional to determine the fee for the service rendered.[328] In its opinion, such a measure, together with the obligation of professionals, under their codes of ethics, to inform their clients of the approximate fee for their services, would enable the consumer to acquire a better knowledge of the factors which can affect the price of the services he is paying for and thus be in a better position to assess the services he receives.

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[327] The American Bar Association has recently amended its Code of Professional Responsibility to permit estimates; see page 226 above.

(ii) Authorized means of distribution

The *Office* has found that in the regulations respecting advertising adopted by the professional corporations under the Professional Code the means by which professionals may transmit information to the public are generally limited to written media such as professional cards, journals, reviews, periodicals and directories, and that there are certain restrictions regarding dimensions and, to a lesser extent, the frequency of announcements. The use of other media, mainly radio and television, is usually not authorized.[329] Generally speaking, the *Office* does not see sufficient reason for suppressing the restrictions provided for in these regulations, at least for the time being. On the whole, they do not appear to be prejudicial to consumers or professionals since the media authorized are apt to ensure a wide distribution of information.

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[328] Certain corporations have recently taken initiatives to this end. In its draft Regulation respecting the code of ethics, Québec Official Gazette, Part 2, June 8, 1977, p. 2747, s. 3.08.03, the Order of Hearing-aid Acousticians has included a provision obliging its members to include in their fee statements certain elements such as a detailed description of the hearing-aid and its accessories, the nature of the services rendered, a description of the guarantee for the hearing-aid, and the total amount of the fees including the cost of the hearing-aid and the terms of payment.

Because they are generally less expensive, written media are within the means of all professionals and as a result enable the consumer to have an overall view of market conditions. They are also very easy to consult and may even be preserved in view of foreseeable future needs. For example, a consumer may examine the advertisements in a newspaper, even a rather long time after their appearance. Hence, these advertisements really permit him to make the desired price comparisons and thus make it easier for both consumers and professional corporations to check the content of the information.

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[329] Their use is permitted by only a few corporations. The Order of Pharmacists permits it expressly for certain types of information: see Regulation respecting advertising, supra, note 211. The Order of Nurses, for its part, authorizes their use implicitly in allowing members who are self-employed any type of advertising on condition that it respect the rules governing the content of the information: see Regulation respecting advertising, Québec Official Gazette, Part 2, December 27, 1974, p. 5469; notice of approval of this was published in the Québec Official Gazette, Part 2, March 12, 1975, p. 1313.

The *Office* recommends, moreover, that another written means be authorized: posting of prices in the professional's office. This costs little and reaches all the professional's clients. Moreover, it would enable the consumer to be better informed and feel more at ease when it comes time to discuss the question of fees. It would also enable him to better understand the information the professional must give him regarding the approximate fee forthe service desired.

The restrictions on size and frequency of advertisements help prevent improper, inappropriate use of the authorized means of distribution. Publication of advertisements covering whole pages of a newspaper, for instance, or appearing several times in the same number does not seem necessary to satisfy the real needs of consumers of professional services. The important thing for them is to be able to find the information they need easily in the media they consult regularly or may consult readily, not that the information be repeated many times or that it occupy a large amount of space. Such a situation would not necessarily be to their advantage since the costs of such a procedure might be passed on to them.

As for the media that are now generally prohibited, such as radio and television, the *Office* does not believe it necessary to authorize them. Aside from the fact that they are usually very expensive,[330] these media cannot be consulted as easily as the written word. Broadcast advertisements last a very short time, at a moment which the consumer cannot know in advance. In addition, they do not leave anything tangible in the consumer's hands, and as a result, he will have difficulty in using them for purposes of comparison.

Obviously, the *Office* is aware that these media would nevertheless enable the public to know the market better and their drawbacks might be thought too slight to justify their prohibition. However, considering that distribution to the public of information on fees for professional services is relatively new, the *Office*, as previously mentioned, wishes to be cautious. Under the circumstances therefore it prefers not to challenge the present restrictions regarding the means of distribution provided for in the regulations of the professional corporations.

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[330] Advertising costs and the effect these can have on the fees for services constitute one of the main arguments of professionals against any further extension of advertising of their services. In "Attitudes Toward Advertising by Accountants: The Professions Should Consider a Different Concept of Advertising for Professional Services", (1977) 143 The Journal of Accountancy, No. 2, 48, p. 50, John R. Darling, after an inquiry conducted among accountants, lawyers, dentists and physicians, observed: "All four professional groups believe that advertising increases the prices of products and services offered."

In closing this outline of the type of information on prices and the means of distribution which should be authorized in the professional services sector, the *Office* is anxious to stress that the question of what should be permitted for each of the professions will be discussed with the professional corporation concerned. It is important to take into account the actual situation of each professional sector and even each profession.[331]

Once this phase of reflection and consultation has been completed, the regulations respecting advertising of the corporations will be amended to authorize professionals to inform the public of their fees. The *Office* hopes that the necessary amendments will be introduced on the initiative of the professional corporations themselves so that it will not have to use its suppletory power.

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[331] The special position of the field of pharmacy might be mentioned as an example. Under the Regulation respecting advertising, *supra*, note 211, the pharmacist, because he is competing with persons who are not pharmacists for the sale of pharmaceutical products other than drugs and poisons, may, like these other persons, advertise these products on the radio or television. On the other hand, the regulation authorizes some information on the price of drugs, but this may be given only on the pharmacy premises or, on request, by telephone. This exceptional restriction is justified by the particular nature of drugs, since they are potentially poisons and anything which might lead to their abuse must be avoided. For further details on the reasons which led to the establishment of such provisions in the regulation, see *Office des Professions du Québec*, *Rapport au lieutenant-gouverneur en conseil concernant certains projets de règlement soumis par l'Ordre des pharmaciens du Québec*, Québec, Québec Official Publisher, January 15, 1975.

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The *Office* does not wish to complete its presentation of the measures for informing the consumer which it is advocating without an attempt to dispel certain fears that might be aroused. First, the objection might be raised that some professionals could use advertising of fees to mislead the public with the object of attracting clients.

The *Office* cannot agree that the principle of informing consumers should be waived because a few professionals might use it to the detriment of the public. The abuses they fear are indeed possible: no regulations can be proof against them. However, considering the control mechanisms instituted by the professional regulations, the *Office* has every reason to believe that these abuses, if they were to be committed, would be entirely marginal.

It is difficult to believe that the consumer will not generally benefit from the information made available, given the objective nature of the information, the codes of ethics that control it (notice of the approximate fees for services and detailed billing), the general standards of integrity imposed by professional ethics and, finally, the conciliation and arbitration procedures for fee statements.[332]

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[332] The Combines Investigation Act, supra, note 40, contains a few provisions intended to exercise a general control over advertising, including that of prices; see sections 36, 36.1 and 37.1 of the act and pages 191-192 above.

If this body of regulations cannot achieve the desired goal, the *Office* does not see what else could. It would then be necessary to reconsider the whole policy of protecting the consumer by keeping him informed, in the professional service sector and in others.

The objection regarding abuses of information about prices could be followed by another concerning the measures to promote price competition. It might be argued that in an intermediate period the competitive climate introduced by these measures could result in professionals losing their ideal of service to the public and becoming nothing more than merchants.

This suggestion that the merchant's function involves something degrading is based on a value judgment tinged with an elitist attitude unacceptable to the *Office* as a criterion in determining its action. Furthermore, to the objection relating to the loss of an ideal of service, it could be replied that this ideal is nowhere to be found in the arguments used by certain professionals to justify a minimum fee schedule, that is, that without a guarantee of a certain level in fees, the quality of services could not be maintained. This type of discussion, based on personal impressions, leads nowhere.

The *Office* believes, rather, that the measures proposed should be assessed in the light of objective reality: professionals, like other producers, are subject to requirements of economic viability which impose certain types of behaviour on them, in particular that of setting their fees at a given level and insisting on payment from their clients. We do not belong to an age in which the client decided what fees he would pay depending mainly on his appreciation of the services rendered.[333] At one time professionals may have remained silent on the question of their fees because they were optional, but the situation has changed considerably and today professionals face the same financial imperatives as do other agents in the economy. This fact is acknowledged by the public.

The corollary which must be recognized by the professionals is that their clients are also subject to imperatives of a financial nature and as a result, they have an interest in knowing the conditions for procuring professional services. If we agree that professionals should receive remuneration that reflects the market situation, it should also be understood that the public will not agree to pay more because of unjustified restrictions on competition and because of the insufficient information available regarding the whole range of professional services and fees.

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[333] In this regard, see Gilles Dussault and Louis O'Neil, La déontologie professionnelle au Québec, (Professional ethics in Québec) Cahiers de l'ISSH, Special Number, Collection Etudes sur le Québec, Québec, Institut Supérieur des Sciences Humaines, Laval University, January 1977, p. 173, and Michel de Coster, "Un mode de rétribution particulier: l'honoraire" (A particular method of remuneration: fees), (1975) 17 Sociologie du travail, 372.

Because professionals render a service in exchange for a remuneration placing them among the best-paid self-employed workers in our society, practising professionals should agree to act in many respects like other agents in the economy. This does not mean that the professional services market does not have its own special features: quite the contrary. Moreover, the competitive measures advocated by the *Office* for the professional services sector take these special features into account.

First, the *Office* recognizes the necessity for maintaining the basic principles of professional regulations that can restrict the availability of professional services in the interest of the quality of services. Also, given the difficulty of checking the accuracy of information relating to the quality of services and the competence of professionals, the *Office* does not suggest that the basic rule in the matter of advertising prohibiting everything that is not specifically authorized be changed; rather it proposes that it be preserved in order to exert strict control over the content of the advertising authorized.[334]

Consequently, the measures advocated by the *Office* respecting the availability of professional services and information about them constitute a modified competitive system, a far cry from a perfect competition model and quite removed from the type of competition prevailing in other sectors of the economy. It is specific to the professional services sector and takes account of the present situation in this market.

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[334] With respect to advertising, the position of the *Office* is similar to that of John R. Darling, supra, note 330, p. 53, when he asserts that professional services "have enough of the elements of public service that competitive advertising, in the traditional sense, might be inappropriate. That is not to say that there cannot be another kind of advertising more appropriate for professionals. The primary purpose of such advertising would be to inform potential clients/patients regarding professional availability, service specialties, range of fees, etc., as opposed to advertising whose primary purpose is to persuade. This sort of advertising can be as much in the public interest as in the interest of professional people."

CONCLUSION

After recommending in Chapters I and II that regulatory fee schedules be abolished, the *Office* has proposed in this chapter a series of measures intended to promote price competition for professional services. Certain of these measures affect the availability of services. They supplement existing regulations and introduce certain guarantees to ensure that present standards and procedures do not unduly limit the supply of services to the public, either by isolating the fields of exclusive practice too completely, or by erecting unnecessary barriers against admission to the professions. The other measures provide for amendments to the regulations respecting advertising of the professional corporations to enable users of professional services to benefit more from the various services available on the market and to know the prevailing fees.

Although moderate, these measures are in line with a school of thought that advocates general removal of economic controls, specifically in regard to prices. Those who subscribe to this principle which is constantly gaining ground emphasize that consumers have had no real advantage from regulatory measures that instituted rigid controls, and that on the contrary, they have benefited from measures favouring competition.[335]

As an illustration of the effects of removing controls on prices in a sector of services comparable to that of professional services, quite an interesting example can be found in the various works devoted to the question: that is, the abolition in May 1975 of compulsory minimum commission fees for securities transactions on the New York Stock Exchange. "Decontrolling" these prices led to a significant decrease in the rates applicable to the whole range of transactions, as observed by the Task Force set up by the *Commission des valeurs mobilières du Québec:*[336]

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[335] See in particular Mary B. Peterson, *The Regulated Consumer*, Los Angeles, Nash Publishing, 1971; William A. Jordan, "Producer Protection, Prior Market Structure and the Effects of Government Regulation", (1972) 15 *The Journal of Law and Economics*, 151; Lee Benham, "The Effect of Advertising on the Price of Eyeglasses", (1972) 15 *The Journal of Law and Economics*, 337; Lee Benham and Alexandra Benham, "Regulating Through the Professions: A Perspective on Information Control", (1975) 18 *The Journal of Law and Economics*, 421; *Promoting Competition in Regulated Markets*, under the direction of Almarin Phillips, Washington, The Brookings Institution, 1975; George J. Stigler, *The Citizen and the State: Essays in Regulation*, Chicago, University of Chicago Press, 1975; *Rent Control, a Popular Paradox: Evidence on the Economic Effects of Rent Control*, *supra*, note 149; David Laidler (et al.), *The Illusion of Wage and Price Control: Essays on Inflation, Its Causes and Its Cures*, under the direction of Michael A. Walker, Vancouver, Fraser Institute, 1976; G.B. Reschenthaler, "Regulatory Failure and Competition", (1976) 19 *Administration publique du Canada*, 466; "Economie et politique", (Economics and politics), address given by André Raynauld, then Chairman of the Economic Council of Canada, in Ottawa, to the Canadian Association of the Club of Rome, on June 14, 1976, pp. 9-12; Paul H. Weaver, "Unlocking the Gilded Cage of Regulation", (1977) 95 *Fortune*, No. 2, 179.

> From May to December 1975, the average commission rate for institutions decreased from 0.84 to 0.59% of the value of the transaction, a decrease of 30%. As for the average retail brokerage rate, it went from 1.73 to 1.62% of the value of the transaction, a decrease of 6%. Nevertheless, it is to be noted that this rate has remained essentially the same on orders of 200 to 1000 shares and has increased by 7% on orders of less than 200 shares.[337]

According to the *Office*, the measures it is suggesting for the professional services sector should also be reflected in a change in the level of fees to the benefit of the consumer. The absence of a regulatory fee schedule will in fact make possible a greater flexibility in fees because professionals will no longer be obliged to respect the floor price established by the regulations and may set their own fees.[338] Certain efficient professionals will then be in a position to offer lower fees to their clientele, taking advantage of reduced operating costs. Other professionals will be induced to follow their example and will attempt to adapt their fees to the particular situation of the various categories of clients they serve or of each client considered individually. The final result will be greater competition to the benefit of all consumers.

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[336] Task Force set up to study commission rates in the securities industry, Commission Rates in the Securities Industry, Montreal, *Commission des valeurs mobilières*, June 18, 1976, p. 87. For particulars added by the Division of Registration, see Updated Report on Commission Rates in the Securities Industry, Montreal, *Commission des valeurs mobilières*, December 17, 1976.

[337] The 6% decrease in the average retail brokerage rate was calculated taking the 7% increase applicable to orders for less than 200 shares into account.

[338] See above pages 49-51 and 111-112.

The measures respecting the availability of professional services will contribute indirectly to maintaining this competition. In fact, although they will not eliminate the various circumstances that can restrict access to the professions, these measures will nevertheless ensure the existence of more diversified entry mechanisms, offer better guarantees to candidates for professional practice and make possible adaptation of fields of practice to the real needs of the market, thus favouring the maintenance or improvement of the situation as regards availability of professional services.

Finally, the measures respecting information on professional services will enable the consumer to know more exactly how his needs can be met and at what price. This fuller information, combined with the possibility open to the professional to reduce his fees, will change to the consumer's advantage the conditions in which the contract for professional services is negotiated. It will then be more a freely negotiated agreement between two autonomous individuals, able to take advantage of what the market offers, and less a one-sided contract.

In summary, the measures proposed by the *Office* should make possible more efficient operation of the professional services market, and should result in generally improved price conditions for consumers. Some will claim that these cost benefits cannot help but be accompanied by a decrease in the quality of professional services. The *Office* has no reason to fear this, given the mechanisms provided in the Professional Code to guarantee the quality of these services. On the contrary, the *Office* believes that, if its recommendations are accepted, the increased competition with which professionals will have to cope will stimulate dynamism and a spirit of innovation conducive to improvement in the quality of professional services. In its opinion, the measures proposed are generally to the benefit of the public.

GENERAL CONCLUSION AND RECOMMENDATIONS

The extensive controls exercised by the producers of professional services are justified by the vulnerable position of the consumer. Since the quality of the professional service is often difficult for the lay public to appreciate, because of the special knowledge required for rendering it, it has always seemed logical that there be strict controls to guarantee this quality and that they be administered by persons who have this knowledge, by the professionals themselves in other words. This was the spirit in which the State granted these controls to professional groups constituted as corporations, entrusting them with the task of ensuring the protection of the public.

Far from questioning the utility of mechanisms whose object is to guarantee the quality of professional services, but seeing in them rather a satisfactory guarantee of quality, the *Office* has noted in this report that there is no reason to intervene with respect to the cost of professional services by establishing fee schedules, in order to safeguard quality. Public protection does not demand that in the name of quality someone should take the place of the parties to the professional services contract and by any type of schedule decide in their stead the fee for this service.

This quality is sufficiently well protected by other aspects of the regulations governing the professions.

Although the quality of services does not require intervention with regard to fees, the situation is not the same with respect to financial accessibility, which is just as important for the protection of the public. However, once again the *Office* considers that setting fee schedules is undesirable, because whether maximum or minimum fees are established, in practice they favour the professionals. In the view of the *Office*, accessibility requires rather some other form of intervention involving measures conducive to price competition.

The *Office* thus refuses to accentuate the consumer's dependency in relation to professional regulations by adding fee-setting provisions. From observation of the lack of balance in the market forces, it seems preferable to attempt to change them to the consumer's benefit to enable him to safeguard his own interests with the help of all the professional regulations. It is in this perspective that the *Office* has advocated measures intended to ensure an adequate level of availability of services to satisfy the demand and enable the consumer to obtain useful information concerning these services and their cost to him.

According to the *Office*, the best type of intervention with respect to the fees for professional services would consist in allowing these fees to find their own level on a competitive market where the ratio of forces between producers and consumers would be in better equilibrium, since the latter will be better informed and therefore less vulnerable. The measures advocated by the *Office* are intended to make the professional services market a sector in which quality is still guaranteed by regulation but cost is subject to a competitive policy specific to the sector, in order to ensure that services are financially accessible.

Consequently, the *Office des professions* recommends to the Minister responsible for implementation of professional legislation and to the government:

(1) THAT section 12 (u) of the Professional Code be amended to make the power of the *Office* and the government to set fee schedules optional rather than mandatory, and that this power be used only when deemed necessary (p.8);

(2) THAT section 12 (u) of the Professional Code, which grants the right to set fee schedules, be amended to allow the application of such power exclusively to professional services rendered in private practice, the fees for which are not determined by law (pp. 13 and 24);

(3) THAT section 126 of the Bar Act be amended to abolish the Bar's power to set extrajudicial fee schedules for its members and that such fee schedules, if deemed necessary, be established only in accordance with section 12(u) of the Professional Code (p.23);

(4) THAT section 102 of the Notarial Act, under which the Order of Notaries has the power to establish fee schedules for its members, be repealed, and that such fee schedules, if deemed necessary, be established only in accordance with section 12 (u) of the Professional Code (p. 23);

(5) THAT, subject to recommendations 6 (d) and 7, the principle of regulatory professional fee schedules be rejected, whether they be

(a) obligatory regulatory schedules giving:
- a minimum (p. 100);
- a maximum (p. 122);
- a fixed fee (p. 131);
- a range (p. 134); or

(b) recommended regulatory fee schedules (p. 161);

(6) THAT pursuant to recommendation 5:

(a) the agronomists' tariff of professional fees be abolished;

(b) the architects' tariff be abolished;

(c) the tariff of the Land Surveyors and Geometers of Québec be abolished and the references in the Land Surveyors Act to the fee schedule that must be adopted under the Professional Code be dropped (note 23);

(d) the provisions in Regulation No. 1 of the Bar of Québec constituting the extrajudicial fee schedule be repealed, with the exception of the 30% maximum, which should be retained until the *Office* has made a study of the effects of the practice of contingent fees to which this maximum is an obstacle (p. 124);

(e) the tariff of professional fees of the Professional Corporation of Chartered Appraisers be abolished;

(f) the engineers' tariff of fees be abolished;

(g) the tariff of fees of members of the Corporation of Forest Engineers be abolished;

(h) the tariff of fees of urbanists be abolished;

(7) THAT under section 12 (u) of the Professional Code, the notaries' tariff of fees be replaced by a fixed or maximum fee schedule applicable to services for which a person pays without having had a choice of notary. However, if, after discussion between the *Office* and the Order of Notaries, it were considered that the abuses which might result from this situation could be prevented by some other means - for example,

amendment of section 26 of the Notarial Act to stipulate that the person who has the choice of notary according to this section must pay him - the notaries' tariff of fees should be abolished (pp.137-138);

(8) THAT an amendment to the Professional Code strictly prohibit the establishment and circulation of fee guides to professional corporations (p.163);

(9) THAT the government study the means of correcting the difficulties experienced by consumer groups in asserting their point of view with as much force as the producers before the public regulatory agencies (p. 119);

(10) THAT the legislation governing the professions be amended to grant to all the professional corporations with an exclusive right to practise the power to delegate professional acts and this power be subject, as in the case of the corporations that now have it, to the suppletory power of the *Office* which enables it to adopt or amend a regulation respecting delegation of acts in the stead of a professional corporation if it fails to do so (pp.203-204);

(11) THAT the Professional Code be amended to grant the *Office* a suppletory regulatory power over admission to professional corporations which would enable it to adopt and amend, in the place of a professional corporation that failed to do so, any regulation respecting:

(a) recognition of diploma and training equivalences (p. 212);

(b) determination of additional conditions, such as a practicum or an examination, required for issuing permits (p. 212);

(12) THAT the Professional Code be amended to require that, with respect to admission to professional corporations, the decision of the board of a corporation not to recognize a diploma or training equivalence:

(a) not be made without the person concerned having an opportunity to be heard by the board or a committee appointed by it (pp.214-215);

(b) state the reasons in writing, including a description of the program of study, practicum or examination required to obtain an equivalence (p. 215);

(c) be open to appeal before the Professional Tribunal (p.215);

(13) THAT with regard to advertising permitted professionals, the present general rule prohibiting all publicity except where expressly authorized be maintained, with the object in particular of prohibiting advertising by professionals respecting the quality of their services (pp. 240 and 257);

(14) THAT professional corporations in which various activity sectors can be identified amend their regulations respecting advertising explicitly to enable their members to inform the public of the fields on which they concentrate or to which they restrict their practice, within the scope of the norms provided in the regulations (pp.246-247);

(15) THAT the professional corporations take the necessary measures to inform the public of the various activity sectors of which they permit mention by their members and to make known the principal types of services offered in each of these sectors (pp. 248-249);

(16) THAT, in particular, the Bar amend its regulation respecting advertising in order to enable lawyers, within the norms stipulated in the regulation, to inform the public of the activity sectors on which they concentrate or to which they restrict their practice (p. 252);

(17) THAT the professional corporations amend their regulations respecting advertising explicitly to enable their members to give the public certain information regarding the fees for their services, notably one or more of the following particulars (pp.258-259):

(a) their hourly rate;
(b) the percentage they charge;
(c) the price of certain fairly standard goods or services;
(d) the fact that they agree to furnish on request a written estimate of the fees for their services.

(18) THAT the professional corporations amend their codes of ethics to oblige their members to supply clients with a detailed statement of their fees (pp.263-264);

(19) THAT the professional corporations amend their regulations respecting advertising to enable their members to post the fees for their services in their offices (p.266);

(20) THAT generally speaking information regarding the activity sectors on which professionals concentrate or to which they restrict their practice and the fees for their services be circulated through the written media now authorized by the corporations' regulations respecting advertising (p.267).

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